Supreme Court, U.S.
FILED
NOV 29 2006
OFFICE OF THE CLERK

No. 05-11284

In The Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RECEIVED
DEC 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOINT APPENDIX

ROBERT C. OWEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705-3299
(512) 232-9391
(512) 232-9171 (facsimile)

Counsel of Record for Petitioner

EDWARD L. MARSHALL
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1600
(512) 320-8132 (facsimile)

Counsel of Record for Respondent

Petition For A Writ Of Certiorari Filed May 30, 2006
Certiorari Granted October 13, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Docket Sheet, *Cole v. Dretke,* No. 00-CV-14, U.S. District Court, Northern District of Texas 1

Docket Sheet, *Cole v. Dretke,* No. 01-10646, U.S. Court of Appeals for the Fifth Circuit..... 4

Trial testimony of Dr. Richard Coons, *State of Texas v. Ted Calvin Cole*, No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 9

Trial testimony of Nancy Doris Hickey, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 34

Trial testimony of Barbara Dean, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 55

Trial testimony of Jarvis Wright, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 60

Trial testimony of Dr. Wendell Dickerson, *State of Texas v. Ted Calvin Cole*, No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 88

Defendant's Objections to Punishment Phase Jury Charge, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988) 115

TABLE OF CONTENTS – Continued

Page

Penalty Phase Jury Charge and Jury Verdict, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988) 125

Penalty Phase Closing Arguments, *State of Texas v. Ted Calvin Cole*, No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988) 131

Trial Court's Findings on State Habeas, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Torn Green County, Texas (May 10, 1999) 149

Opinion on State Habeas, *Ex parte Cole,* No. 41,673-01 (Tex.Crim.App. 1999) (unpublished decision), Texas Court of Criminal Appeals (November 24, 1999) 178

Opinion on Federal Habeas, *Cole v. Johnson,* No. 6:00-CV-014-C (N.D. Texas 2001) (not reported), U.S. District Court, S.D. Tx. (March 5, 2001) 180

Opinion on Federal Habeas Appeal, *Cole v. Dretke,* No. 01-10646, 418 F.3d 494 (5th Cir. 2005), U.S. Court of Appeals, 5th Circuit (July 22, 2005) 219

Order Granting *In Forma Pauperis* Status and Writ of Certiorari, *Cole v. Quarterman,* No. 05-11284, 2006 WL 1523202, U.S. Supreme Court (October 13, 2006) 251

DOCKET ENTRIES
U.S. District Court
Northern District of Texas (San Angelo)
CIVIL DOCKET FOR CASE #: 00-CV-14
Cole v. Johnson

* * *

2/10/00	4	ORDER granting [2-1] motion for appointment of counsel, denying [2-2] motion to extend time (for 120 days to file petition for writ of habeas corpus), granting [1-1] motion to proceed in forma pauperis; all other relief requested DENIED; (signed by US Dist Jd Cummings) Copies to counsel: 2/10/00 Page(s) 2 (mrr)

* * *

6/1/00	18	PETITION for writ of habeas corpus; Date Received: 6/1/00 (54) (blr)

* * *

7/5/00	22	ANSWER to Complaint by respondent Gary Johnson (Attorney Katherine D Hayes), (72) (mrr) [Edit date 07/05/00]
7/5/00	22	MOTION with memorandum in support by respondent Gary Johnson for summary judgment (72) (mrr)

* * *

7/25/00	24	MEMORANDUM by petitioner Ted Calvin Cole in opposition to [22-1] answer, [22-1] motion for summary judgment (22) (blr)

* * *

3/6/01	52	ORDER denying [18-1] petition for Writ of Habeas Corpus *claims unsupported by specifics are subject to summary dismissal; state court determination should be upheld for failure of Pet to prove objectively unreasonable; Pet not prejudiced by appellate counsel's deficient performance on direct appeal; all relief not expressly granted is denied; SEE ORDER FOR SPECIFICS (Signed by Judge Sam R. Cummings) Copies to counsel, Gov Office, Atty Gen, Warden Walls Unit, Director TDCJ, Sup Ct Clerk, Ct Apps 5th Circ Clerk, (via fax & mail) (telephoned above to notify of Order/Jdgment): 3/6/01 Page(s) 37 (blr) [Edit date 03/06/01]
3/6/01	53	JUDGMENT that Petitioner's Petition for Writ of Habeas Corpus is DENIED & cause is DISMISSED w/prejudice (Signed by Judge Sam R. Cummings) Copies to counsel: 3/6/01 Page(s): 1 (blr)

* * *

5/18/01	57	NOTICE OF APPEAL by petitioner Ted Calvin Cole re [53-1] judgment order, [56-1] order Appeal record due on 6/4/01 (blr)

* * *

5/30/01	59	CERTIFICATE OF APPEALABILITY & ORDER – Petitioner should be allowed to proceed in forma pauperis on appeal; Petitioner's [58-1] motion for certificate of appealability should be DENIED for reasons stated in Order & Judgment filed 3/6/01; (Signed by Judge Sam R. Cummings) Copies

to counsel: 5/30/01 Page(s) 1 (mrr) [Edit date 05/30/01]

* * *

DOCKET ENTRIES
US Court of Appeals for the Fifth Circuit
Court of Appeals Docket #: 01-10646
Cole v. Dretke

* * *

11/19/01 Motion filed by Appellant Ted Calvin Cole for certificate of appealability [3432862-1] Motion due ddl satisfied. Sufficient [Y/N]: Y. [01-10646] (mrw)

11/19/01 Brief filed in support of motion for Certificate of Appealability [3432862-1] by Appellant Ted Calvin Cole Brief in Support ddl satisfied. [3432873-1] [01-10646] (mrw)

* * *

1/22/02 Response/opposition filed by Appellee Janie Cockrell to motion for Certificate of Appealability [3432862-1] by Appellant Ted Calvin Cole Response/Opposition ddl satisfied. Sufficient [Y/N]: N over page limitation. [3489528-1] [01-10646] (mrw)

* * *

2/27/02 Reply filed by Appellant Ted Calvin Cole to response/opposition [3489528-1], motion for Certificate of Appealability [3432862-1] Sufficient [Y/N]: y. [3621950-1] [01-10646] (mrw)

* * *

8/13/03 COURT Order filed granting in part motion for Certificate of Appealability (IN DETAIL). Also COA GRANTED SUA SPONTE ON PROCEDURAL-DEFAULT ISSUE. [3432862-1] (PEH-JLW-RHB) Copies to all counsel. [01-10646] (mrw)

* * *

9/24/03 Appellant's Brief filed by Appellant Ted Calvin Cole. Copies of Brief: 7 # of pages: 57 Word count: 13,883 Date of COS: 9/22/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4618836-1] [01-10646] A/Pet's Brief ddl satisfied. E/Res's Brief due on 10/24/03 for Doug Dretke. (jbr)

* * *

10/27/03 Appellee's Brief filed by Appellee Doug Dretke. Copies of Brief: 7 # of pages: 48 Word count: 13,353 Date of COS: 10/24/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4650005-1] [01-10646] E/Res's Brief ddl satisfied. Reply Brief due on 11/10/03 for Ted Calvin Cole. (mrw)

11/10/03 Reply brief filed by Appellant Ted Calvin Cole. Copies of Brief: 7 # of pages: 28 Word count: 6,639 Date of COS: 11/10/03. Disk Provided [Y/N]: Y. [4662764-1] [01-10646] Reply Brief ddl satisfied. (jbr)

11/10/03 Motion to reconsider denial of certificate of appealability on appellant's Penry claim filed by Appellant Ted Calvin Cole. [4662825-1] [3432862-1] Date of COS: 11/7/03. [01-10646] (jbr)

* * *

11/14/03 Response/opposition filed by Appellee Doug Dretke to motion for reconsideration [4662825-1] by Appellant Ted Calvin Cole Response/ Opposition ddl satisfied. Date of COS: 11/13/03 Sufficient [Y/N]: Y. [4668423-1] [01-10646] (mrw)

11/19/03 COURT Order filed. Appellant's motion to reconsider denial of certificate of appealability on appellant's Penry claim is carried with the

appeal. [4662825-1] (PEH-JLW-RHB) Copies to all counsel. [01-10646] (jbr)

11/19/03 COURT Order filed granting motion to amend caption. [4662858-1] (JLW) Copies to all counsel. [01-10646] (jbr)

* * *

11/19/03 Reply filed by Appellant Ted Calvin Cole to respondent's opposition to motion to reconsider denial of certificate of appealability. [4668423-1] [4672385-1] [01-10646] (jbr)

* * *

11/20/03 Oral argument heard. Case argued by Robert Charles Owen for Appellant Ted Calvin Cole, Katherine D Hayes for Appellee Doug Dretke [01-10646] (pft)

* * *

5/19/04 COURT Order filed denying appellant's motion for reconsideration. (HANDLED IN OPINION) [4662825-1] (PEH,JLW,RHB) Copies to all counsel. [01-10646] (jma)

5/19/04 Judgment entered and filed. [01-10646] (jma)

* * *

11/22/04 Supreme Court order received granting petition certiorari [4923790-1] by Appellant Ted Calvin Cole on 11/15/04. [01-10646] (cav)

* * *

1/14/05 Supplemental brief filed by Appellant Ted Calvin Cole. Copies of Brief: 7 # of pages: 37 Date of COS: 1/7/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: N over page limitation and cover should be tan. [5053316-1] [01-10646]

A/Pet Supplemental Brief ddl satisfied. Sufficient Brief due on 1/24/05 for Ted Calvin Cole. (mrw)

1/21/05 Supplemental brief filed by Appellee Doug Dretke Copies of Brief: 7 # of pages: 16 Word count: 4,128 Date of COS: 1/20/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [5058858-1] [01-10646] E/Res Supplemental Brief ddl satisfied. (mrw)

* * *

2/2/05 Response/opposition filed by Appellant Ted Calvin Cole to brief(s) [5069025-1] by Appellee Doug Dretke Sufficient [Y/N]: Y [5069025-1] [01-10646] (mrw)

* * *

4/21/05 Supplemental memorandum filed by Appellant Ted Calvin Cole [5143322-1] [01-10646] (mrw)

4/21/05 Supplemental memorandum filed by Appellee Doug Dretke [5143323-1] [01-10646] (mrw)

5/11/05 Oral argument heard. Case argued by Robert Charles Owen for Appellant Ted Calvin Cole, Carla Elaina Eldred for Appellee Doug Dretke [01-10646] (vlb)

* * *

7/22/05 Opinion filed. Issd in T form? Y Mandate pull date is 8/12/05. [01-10646] (rmf)

7/22/05 Judgment entered and filed. [01-10646] (rmf)

* * *

8/4/05 Petition filed by Appellant Ted Calvin Cole for rehearing en banc. # of copies filed: 20 [5249433-1] Mandate pull date canceled. Date

of COS: 8/3/05 Sufficient [Y/N]: Y [01-10646] (mrw)

* * *

3/17/06 COURT Order filed denying appellant's petition for rehearing en banc [5249433-1] With poll (Y/N)?: y JLD dissenting, with whom CDK, joins Mandate pull date is 3/24/06. Copies to all counsel. [01-10646] (jma)

* * *

****

CAUSE NUMBER CR88-0043-A

THE STATE OF TEXAS	> IN THE DISTRICT COURT OF
VERSUS	> TOM GREEN COUNTY, TEXAS
TED CALVIN COLE	> 51ST JUDICIAL DISTRICT

****

* * *

[745] THEREUPON,

RICHARD E. COONS

WAS CALLED AS A WITNESS ON BEHALF OF THE STATE AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SMITH:

Q SIR, WOULD YOU STATE YOUR FULL NAME FOR THE RECORD?

A YES. "RICHARD E. COONS," C-O-O-N-S.

Q SIR, HOW ARE YOU EMPLOYED OR SELF-EMPLOYED OR . . . ?

A I PRACTICE GENERAL PSYCHIATRY IN AUSTIN.

Q SIR, COULD YOU STATE YOUR EDUCATIONAL CREDENTIALS, PLEASE?

A YES. EXCUSE ME. I GRADUATED FROM HAMPDEN SYDNEY COLLEGE IN VIRGINIA IN 1961 WITH A BACHELOR OF SCIENCE DEGREE, A PRE-MED MAJOR. AND THEN I ATTENDED THE UNIVERSITY OF TEXAS LAW SCHOOL IN AUSTIN FROM 1961 TO 1964. I GRADUATED WITH A LAW DEGREE AND WAS LICENSED TO PRACTICE LAW IN TEXAS IN 1964. THEN I ATTENDED THE UNIVERSITY OF TEXAS MEDICAL BRANCH IN GALVESTON FROM 1964 TO 1968, GRADUATED WITH A DOCTOR OF MEDICINE DEGREE IN 1968, AND WAS LICENSED [746] TO PRACTICE MEDICINE IN TEXAS THAT YEAR.

THEN I DID A ROTATING INTERNSHIP AT THE UNIVERSITY OF CINCINNATI, CINCINNATI GENERAL HOSPITAL FROM 1969 – EXCUSE ME, 1968 AND '69. THEN I RETURNED TO GALVESTON AND DID A FULL THREE-YEAR GENERAL PSYCHIATRY RESIDENCY IN THE DEPARTMENT OF PSYCHIATRY AND NEUROLOGY AND COMPLETED THAT IN 1972. IN 1971 AND '72, I WAS CHIEF RESIDENT IN THE DEPARTMENT OF PSYCHIATRY AND NEUROLOGY AT THE MEDICAL BRANCH IN GALVESTON.

ON COMPLETION OF MY PSYCHIATRIC SPECIALTY TRAINING, I THEN BEGAN SERVICE IN THE UNITED STATES ARMY MEDICAL CORP AS A MAJOR AT FORT SAM HOUSTON, TEXAS, FOR TWO YEARS. I RAN THE DRUG AND ALCOHOL PROGRAM THERE. AND I WAS A PSYCHIATRIC CONSULTANT TO BROOKE GENERAL HOSPITAL. UPON COMPLETION

OF MY MILITARY SERVICE IN 1974, I MOVED TO AUSTIN. I'VE BEEN IN PRIVATE GENERAL PSYCHIATRIC PRACTICE THERE SINCE 1974.

I'M BOARD-CERTIFIED IN GENERAL PSYCHIATRY BY THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY AS OF FEBRUARY 1975. MY MEDICAL LICENSE IS ON FILE WITH THE DISTRICT CLERK IN TRAVIS COUNTY, WHERE I PRACTICE.

Q OKAY. ARE YOU CALLED ON OCCASIONALLY TO EVALUATE PEOPLE – DEFENDANTS IN CRIMINAL CASES?

A YES, VERY COMMON.

Q HOW OFTEN IS THAT?

[747] A. WELL, I'VE EXAMINED TWO OR THREE THOUSAND PEOPLE THAT WERE CHARGED WITH FELONIES IN TRAVIS COUNTY, WHERE I LIVE, AND I'VE ALSO DONE SOME EVALUATIONS FOR WILLIAMSON COUNTY, QUITE A NUMBER OF OTHER COUNTIES, TOM GREEN COUNTY OVER THE YEARS. I WOULD SAY THAT ... SOMEWHERE BETWEEN TWO AND THREE THOUSAND PEOPLE.

Q HAVE YOU APPEARED BOTH FOR THE STATE AND THE DEFENSE IN CASES?

A YES.

Q OKAY. DID YOU EXAMINE THE INDIVIDUAL THAT'S – IN THIS CASE, TED CALVIN COLE?

MR. SPENCE: YOUR HONOR, I WOULD LIKE TO TAKE THE WITNESS ON VOIR DIRE AT THIS TIME.

THE COURT: FOR WHAT PURPOSE?

MR. SPENCE: FOR WHAT PURPOSE? TO DETERMINE WHETHER OR NOT THERE WERE ANY MIRANDA WARNINGS GIVEN.

THE COURT: I NOTE HERE IN THE FILE THAT ON MARCH THE 1ST, I HAVE A LETTER JUDGE HART HAD ORDERED, AS JUDGE OF THE 51ST JUDICIAL DISTRICT, THAT PURSUANT TO AN ORDER SIGNED BY JUDGE HART ON FEBRUARY 9TH, 1988, A PSYCHOLOGICAL EXAMINATION WAS PERFORMED BY MR. COONS. NOW, IN WHAT – CAN YOU GIVE ME WHAT STATUTE OR WHAT – WHAT PORTION OF THE LAW YOU'RE TALKING IN REFERENCE TO? THE COURT'S ORDERED THE PSYCHIATRIC EXAMINATION. THERE [748] ARE NO MIRANDA WARNINGS REQUIRED.

MR. SPENCE: WELL, YOUR HONOR, THERE'S A NEW SUPREME COURT CASE WHICH CAME OUT THIS WEEK –

THE COURT: EXCUSE ME.

HAVE THE JURY PLEASE STEP OUTSIDE.

[THEREUPON, THE JURY WAS RETIRED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: DO YOU HAVE SOMETHING YOU WANT TO GIVE THEM?

THE WITNESS: NO, SIR, IT'S JUST A COPY OF THE ORDER.

THE COURT: ALL RIGHT. CITE ME WHAT YOU WANT TO CITE. THE JURY – LET THE RECORD REFLECT THE JURY HAS BEEN EXCUSED.

WHAT DO YOU WANT TO CITE ME?

MR. SPENCE: THE SATTERWHITE CASE, WHICH CAME OUT EARLIER THIS WEEK, I BELIEVE. I HAVE NOT SEEN A COPY OF THE CASE. ALL I KNOW IS WHAT I'VE BEEN TOLD, WHICH IF THE MIRANDA WARNINGS HAVE NOT BEEN GIVEN TO THE DEFENDANT, THEN BASICALLY THE COMPETENCY AND ANYTHING THAT HAS BEEN TESTED BY THE DOCTOR IS NOT GOING TO BE ADMISSIBLE.

[749] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

THE COURT: OKAY.

MR. ALCALA: YOUR HONOR, WE INTEND TO – WE ANTICIPATE THE EVIDENCE TO SHOW THAT INDEED THE WARNINGS WERE GIVEN. NEVERTHELESS, THOUGH, IT WOULD BE MOOT. WE HAVEN'T GOT TO THAT POINT TO ASKING THE DOCTOR WHETHER HE DID OR NOT, AND IT'S NOT –

THE COURT: IT'S NOT AT ISSUE YET.

HAS ANYBODY SEEN THE SATTERWHITE CASE?

MR. ALCALA: NO.

THE COURT: ARE Y'ALL AWARE OF IT?

MR. SMITH: YES, YOUR HONOR.

MR. FOHN: ALSO, ESTELLE VERSUS – SMITH VERSUS ESTELLE, WHICH DOES SPEAK IN TERMS OF WARNINGS –

THE COURT: I UNDERSTAND THAT.

MR. FOHN: – IN THE OLD CASES.

THE COURT: WHAT ARE YOU – WELL, WHAT I'M ASKING ABOUT IS – I UNDERSTAND THE WARNINGS. THERE'S SOME FORM OF WARNINGS NEED TO BE GIVEN OR EXPLAINED.

MR. FOHN: YES, SIR.

THE COURT: MY QUESTION IS: ARE YOU SAYING THAT THAT CASE SAYS THEY HAVE TO BE IN WRITING AND HE HAS TO SIGN OFF ON THOSE, OR WHAT ARE YOU SAYING?

MR. SPENCE: WHAT I'M SAYING IS, YOUR HONOR, [750] THAT WARNINGS HAVE TO BE GIVEN. NOW, AS TO ANY PARTICULAR FORM OR FASHION, I'M NOT AWARE OF THAT.

THE COURT: ALL RIGHT. THAT'S ALL I WANTED TO KNOW. I DON'T THINK WE'RE TO THAT POINT TO TAKE THE – TO TAKE THE WITNESS ON VOIR DIRE. I WILL ALLOW YOU TO TAKE THE WITNESS ON VOIR DIRE ONCE, IF – BEFORE HE TENDERS HIS DIAGNOSIS OR PRESENTS ANY WRITTEN REPORTS, I WOULD ALLOW YOU TO TAKE THE WITNESS ON VOIR DIRE. I WOULD ASSUME THAT THE STATE IS GOING TO GO THROUGH WHAT THEY DID AND HOW THEY CAME TO THAT POINT OF THE EXAMINATION AND WHAT THEY OBSERVED BASED UPON THAT. AND WHEN YOU GET TO THAT POINT, I

THINK IT WOULD BE A PROPER TIME TO MAKE THE OBJECTION.

NOW, IF YOU DISAGREE WITH ME, IF YOU DESIRE TO STILL TAKE THE WITNESS ON VOIR DIRE AT THIS MOMENT, I WILL CERTAINLY ALLOW THAT. I THINK – I THINK IT'S NOT THE PROPER TIME FOR THE OBJECTION; BUT IF YOU WANT TO TAKE THE WITNESS ON VOIR DIRE, I'M GOING TO GIVE YOU AS MUCH FLEXIBILITY AS POSSIBLE, MR. SPENCE.

MR. SPENCE: THANK YOU, YOUR HONOR.

THE COURT: DO YOU WANT TO TAKE THE WITNESS ON VOIR DIRE AT THIS TIME, OR DO YOU WANT TO WAIT UNTIL THE MATTER BECOMES AN ISSUE?

MR. SPENCE: I'D LIKE TO DO IT AT THIS TIME, [751] YOUR HONOR.

THE COURT: ALL RIGHT. PROCEED.

VOIR DIRE EXAMINATION

BY MR. SPENCE:

Q DR. COONS, WHEN WAS THE FIRST TIME THAT YOU SAW TED COLE?

A ON FEBRUARY 19TH, 1987.

Q FEBRUARY THE 19TH?

A YES, SIR.

Q IS THAT THE ONLY TIME THAT YOU'VE SEEN HIM?

A YES.

Q AT THAT TIME WHEN HE CAME TO – I SUPPOSE THAT HE CAME TO YOUR OFFICE IN AUSTIN.

THE COURT: EXCUSE ME. I ASSUME YOU WANT THIS VOIR DIRE PROCESS TAKEN OUTSIDE THE PRESENCE OF THE JURY?

MR. SPENCE: YES, YOUR HONOR.

THE COURT: PURSUANT TO YOUR REQUEST, THE JURY IS STILL OUT OF THE BOX, AND YOU MAY CONTINUE.

BY MR. SPENCE:

Q HE WAS TAKEN TO YOUR OFFICE THERE IN AUSTIN?

A HE WAS TAKEN TO THE OFFICE OF DR. GEORGE PARKER, WHERE –

[752] Q DR. GEORGE PARKER.

A – HE WAS EXAMINED.

Q AND YOU SAW HIM IN DR. GEORGE PARKER'S OFFICE?

A YES.

Q NOW, AT THE TIME THAT YOU TALKED TO MR. COLE AND DID AN EVALUATION AS TO HIS COMPETENCY TO STAND TRIAL, WERE ANY MIRANDA WARNINGS – FIFTH AMENDMENT WARNINGS GIVEN TO HIM AT THAT TIME?

A YES.

Q WERE THEY GIVEN IN WRITING, SIR?

A NO.

Q THEY WERE ORALLY GIVEN?

A YES.

MR. SPENCE: I HAVE NO FURTHER QUESTIONS YOUR HONOR.

THE COURT: ALL RIGHT. ANYTHING ELSE?

ALL RIGHT, LET'S BRING THE JURY BACK IN.

DO YOU HAVE ANY OBJECTION TO MAKE OUTSIDE OF THE PRESENCE OF THE JURY AT THIS TIME?

MR. SPENCE: SIR?

THE COURT: DO YOU HAVE ANY OBJECTION TO MAKE OUTSIDE THE PRESENCE OF THE JURY AT THIS TIME?

[753] MR. SPENCE: NO, YOUR HONOR.

THE COURT: IT WOULDN'T BE TIMELY, BUT IF YOU WANT TO MAKE THEM, YOU MAY.

BRING THE JURY BACK IN.

DIRECT EXAMINATION [RESUMED]

BY MR. SMITH:

Q DR. COONS, WHAT ADDITIONAL WARNINGS DID YOU GIVE?

A [NO RESPONSE]

THE COURT: NO, NO, NO, NO, NO, NO.

THAT'S FINE. I'VE RULED ON HIS – I'VE RULED – HE'S TAKEN HIM ON VOIR DIRE. HE HASN'T MADE AN OBJECTION; SO WE DON'T GO THAT WAY. WE BRING THEM BACK IN, AND YOU CAN START ASKING IN FRONT OF THE JURY.

MR. SMITH: OKAY.

[THEREUPON, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: BE SEATED.

[754] LET'S PROCEED. THE RECORD WILL REFLECT THAT ALL PARTIES ARE PRESENT. THE JURY IS IN THE BOX.

YOU MAY PROCEED, MR. SMITH.

MR. SMITH: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION [RESUMED]

BY MR. SMITH:

Q I BELIEVE I WAS ASKING THE QUESTION "DID YOU EXAMINE THE INDIVIDUAL IN THIS CASE, TED CALVIN COLE?"

A YES.

Q UNDER WHAT CIRCUMSTANCES DID YOU CONDUCT THE EXAMINATION?

A UNDER A COURT ORDER. HE WAS BROUGHT TO AUSTIN, TEXAS, TO THE OFFICE OF DR. GEORGE

PARKER Ph.D., CLINICAL PSYCHOLOGIST WHO PARTICIPATED IN A PORTION OF THE EXAMINATION BY PERFORMING SOME PSYCHOLOGICAL TESTING.

Q AND WHAT WAS THE DATE OF THIS EXAMINATION?

A ON FEBRUARY 19TH, 1987.

Q DID YOU GIVE THE DEFENDANT ANY WARNINGS?

A YES.

Q WHAT WARNINGS DID YOU GIVE HIM?

A WELL, ESSENTIALLY, WE DISCUSSED WHY THE EXAMINATION WAS BEING DONE, THAT HE DID NOT HAVE TO PARTICIPATE IN IT AND SO FORTH, AND THAT HE – THAT IT WAS PURSUANT TO A COURT-ORDERED EXAMINATION; NONE OF THE COMMUNICATIONS WOULD BE PRIVILEGED; A COPY OF THE REPORT WILL BE AVAILABLE TO THE [755] COURT, THE DISTRICT ATTORNEY, AND THE DEFENSE ATTORNEY, AND THAT I MAY BE REQUIRED TO TESTIFY IN COURT REGARDING ALL COMMUNICATIONS WHICH OCCURRED – CURED – OCCURRED DURING THE EXAMINATION AND INTERVIEW.

Q DID YOU GIVE HIM HIS MIRANDA RIGHTS AS WELL?

A YES. I MEAN, WE DISCUSSED THAT AS WELL.

Q AND DID HE SEEM TO UNDERSTAND?

A OH, YES. WE DISCUSSED IT. AND LATER IN THE EXAMINATION I ALSO WENT OVER THE – SOME OTHER WARNINGS . . . I MEAN, REITERATED THE WARNINGS.

Q COULD YOU READ SPECIFICALLY THE WARNINGS THAT YOU GAVE HIM INTO THE RECORD, PLEASE?

A COULD I READ THE WARNINGS THAT I GAVE HIM?

Q YES.

A THAT HE HAS THE RIGHT TO HAVE HIS LAWYER PRESENT TO ADVISE HIM; THAT IF HE WAS UNABLE – WELL, I DIDN'T GO INTO UNABLE TO EMPLOY A LAWYER, THAT HE HAD A RIGHT TO – BECAUSE WE DISCUSSED THAT HE ALREADY DID HAVE A LAWYER AND HE HAD DISCUSSED IT WITH HIS LAWYER.

YOU [SIC] HAVE THE RIGHT TO REMAIN SILENT, NOT MAKE ANY STATEMENT, AND THAT ANY STATEMENT THAT HE SO MADE COULD BE USED IN EVIDENCE AGAINST HIM. WHAT I INDICATED TO HIM WAS THAT THE STATEMENTS THAT HE MADE TO ME WOULD NOT BE USED TO PROVE HIM GUILTY IN THE TRIAL, THAT THEY WERE MADE FOR THE PURPOSE OF OPINIONS ABOUT HIS COMPETENCY [756] AND SANITY.

THEN WE WENT TO THE ISSUE OF THE PUNISHMENT PHASE OF THE TRIAL. AND I TOLD HIM THAT HE COULD TERMINATE THE INTERVIEW. I ALSO READ THE – WHAT I HAD JUST STATED FROM THE ORDER.

Q WHEN YOU SPOKE OF THE PUNISHMENT PHASE, WHAT SPECIFIC WARNINGS DID YOU TALK – GIVE TO HIM ABOUT THE PUNISHMENT PHASE?

A THAT I COULD BE A WITNESS AT THE PUNISHMENT PHASE OF HIS TRIAL. WE DISCUSSED THE ISSUE ABOUT WHETHER – THAT THE JURY WOULD BE ASKED TO DECIDE WHETHER A DEFENDANT – WHETHER THERE WAS A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE IN THE FUTURE WHICH WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY AND THAT THAT – THAT I MIGHT WELL BE CALLED AS A WITNESS IN THAT REGARD AND THAT DR. PARKER MIGHT BE CALLED AS A WITNESS IN THAT REGARD.

Q WHAT TESTS WERE CONDUCTED?

A HE WAS ADMINISTERED A MINNESOTA MULTIPHASIC PERSONALITY INVENTORY, WHICH IS THE M.M.P.I.; RORSCHACH INKBLOT TEST, ROTOR INCOMPLETE SENTENCES; AND PSYCHOLOGICAL ASSESSMENT INTERVIEW AND A PSYCHOLOGICAL STATUS INVENTORY.

Q WHO CONDUCTED THOSE TESTS?

A DR. GEORGE PARKER.

Q DID YOU CONSULT WITH HIM?

[757] A. YES.

Q DOES CONSULTATION WITH HIM AND THE RESULTS OF THE TESTS FORM A BASIS OF YOUR OPINION?

A IT'S A PORTION OF MY OPINION, YES. I'VE TAKEN THAT INTO CONSIDERATION.

Q OKAY. WHAT IS YOUR PROFESSIONAL RELATIONSHIP WITH DR. PARKER?

A DR. PARKER IS AN INDEPENDENT PRACTITIONER OF PSYCHOLOGY, WHO AT TIMES I HAVE REFERRED PATIENTS TO REGARDING PSYCHOLOGICAL TESTING, AND HE DOES MOST OF THE CRIMINAL FORENSIC PSYCHOLOGY IN THE AUSTIN AREA. HE'S A FORMER PROFESSOR AT THE UNIVERSITY OF TEXAS FOR ELEVEN YEARS IN PSYCHOLOGICAL TESTING. AND I UTILIZE HIS SERVICES AT TIMES OR THE DISTRICT ATTORNEY'S OFFICE OR PRIVATE LAWYERS WILL ASK HIM TO PERFORM PSYCHOLOGICAL TESTING IN CRIMINAL OR CIVIL MATTERS. WE DON'T OFFICE TOGETHER. WE'RE NOT FINANCIALLY INVOLVED IN ANY WAY.

Q OKAY. DID YOU FORM AN OPINION AS TO WHAT TYPE OF PERSONALITY TED CALVIN COLE HAS?

A YES.

Q AND WHAT WAS THAT PERSONALITY – OPINION?

A HE HAS A NUMBER OF SOCIOPATHIC FEATURES.

MR. SPENCE: YOUR HONOR, I'M GOING TO OBJECT TO THIS ON THE – ON THE GROUNDS THAT WHATEVER OPINIONS HE – [758] HE FORMED OUT OF THIS COULD NOT BE BASED ON THE TESTS THAT HE GIVES, THAT THE TIME THAT HE SPENT

WITH HIM IN AUSTIN WAS INSUFFICIENT FOR THIS OPINION.

THE COURT: THAT GOES TO THE WEIGHT OF THE EVIDENCE, NOT THE ADMISSIBILITY.

YOU MAY CONTINUE.

BY MR. SMITH:

Q COULD YOU REPEAT YOUR ANSWER, PLEASE?

A YES. MR. COLE HAS A NUMBER OF SOCIOPATHIC ANTISOCIAL PERSONALITY FEATURES TO HIS PERSONALITY.

Q WAS THAT INDICATED IN YOUR INTERVIEW WITH MR. COLE? COLE?

A YES. WELL, IN THE INTERVIEW, IN THE PSYCHOLOGICAL TESTING, AND IN THE HISTORY OF – THAT I HAD AS WELL ABOUT HIS PRIOR HISTORY.

Q OKAY. HOW WAS IT INDICATED TO YOU IN YOUR INTERVIEW WITH THE INDIVIDUAL?

A WELL, THE HISTORY OF – THAT HE GAVE ME ABOUT HIS DELIBERATION ABOUT THIS OFFENSE THAT HE WAS DOING, THIS WILLINGNESS TO TAKE THE LIFE OF ANOTHER PERSON FOR FINANCIAL GAIN; THE – HIS PRIOR CRIMINAL HISTORY, WHICH – WHICH HE DESCRIBED TO ME; HIS – HIS FEELINGS AND ATTITUDE ABOUT HAVING COMMITTED THIS OFFENSE, IN TERMS OF INDICATING THAT IT DID NOT BOTHER HIM THAT HE HAD KILLED THIS OLDER MAN [759] AND HIS

RATIONALE FOR WHY IT DIDN'T BOTHER HIM, THAT HE WAS OLD AND ALL HE DID WAS SIT AROUND THE HOUSE AND DRINK VODKA, AND HALF THE TIME HE DIDN'T KNOW WHERE HE WAS; AND THE ONLY THING ABOUT THIS THAT BOTHERS ME IS GETTING CAUGHT. THOSE ARE FEATURES OF A PERSON WITH – WHO HAS SERIOUS CONSCIENCE DEFECTS WHICH YOU SEE IN SOCIOPATHIC OR ANTISOCIAL PERSONALITIES, THE LACK OF REMORSE FOR THINGS, THE LACK OF CONSCIENCE ABOUT THEM.

Q HOW WAS HIS LACK OF REMORSE INDICATED?

A WELL, I MEAN, "HOW DO YOU FEEL ABOUT KILLING THE OLD MAN?" "WELL, IT DOESN'T REALLY BOTHER ME." AND HE DIDN'T LOOK LIKE IT BOTHERED HIM, AND HE DIDN'T TALK LIKE IT BOTHERED HIM, AND I DON'T BELIEVE IT BOTHERED HIM.

Q DID HE INDICATE ANYTHING – THAT HE REGRETTED ANYTHING ABOUT THIS?

A I'M SORRY?

Q DID HE INDICATE THAT HE REGRETTED ANYTHING CONCERNING THIS?

A WELL, ON THE PSYCHOLOGICAL TESTING, ONE OF THE TESTS THAT'S GIVEN IS CALLED A "ROTOR INCOMPLETE SENTENCES," AND THESE ARE – IT'S A PROJECTIVE TEST WHERE A NUMBER OF INCOMPLETE SENTENCES ARE GIVEN, AND THE PERSON WHO IS TAKING THE TEST THEN FILLS OUT WHAT THEIR RESPONSE IS. AND IT WOULD BE

THINGS LIKE, "I LIKE" AND BLANK, AND THE PERSON TAKING THE TEST FILLS IN THE BLANK. "I LIKE ICE [760] CREAM" OR "MOTHER" OR "POWER" OR WHATEVER. AND THERE'S QUITE A NUMBER OF QUESTIONS. AND ONE THAT STUCK OUT WAS THAT – IT BEGINS, "I REGRET . . . " AND MR. COLE'S RESPONSE TO THAT WAS "NOTHING," EXCLAMATION POINT. AND THAT'S THE KIND OF THING THAT YOU WOULD EXPECT TO SEE IN SOMEONE WHO REGRETS NOTHING.

MR. SMITH: YOUR HONOR, MAY I APPROACH THE COURT REPORTER'S DESK HERE?

THE COURT: YOU MAY APPROACH.

BY MR. SMITH:

Q DR. COONS, I WANT TO GIVE YOU SORT OF A HYPOTHETICAL HERE. WHAT WOULD YOU THINK OF A THIRTY-YEAR-OLD MALE WHO WOULD WRITE IN A – SAY IN A DIARY OR EXPRESS THESE IDEAS, AS TO WHETHER HE WOULD FIT INTO AN ANTISOCIAL CATEGORY AS FAR AS PERSONALITY – SOCIOPATHIC PERSONALITY, MINDING THAT THIS IS A THIRTY-YEAR-OLD-MALE, "MET SOME CUTE TWELVE-YEAR-OLD NAMED 'CODY.' GOT TO HAVE HIM SOONER OR LATER. T.J. KNOWS A BUNCH OF THEM. THEY'RE ALL JAIL BAIT," AND THEN FURTHER, "I NEED SOME EXCITEMENT SO I CAN FEEL THAT I AM ALIVE ONCE IN AWHILE. WANT TO FIND SOMEONE WHO IS YOUNG, ATTRACTIVE AND WITH A SENSE OF ADVENTURE, WITH WHOM I CAN ROAM AROUND THE WORLD, SAILING IN THE SOUTH PACIFIC, THE CARIBBEAN, EXPLORING THE MEDITERRANEAN, PARTYING SOME-[761]WHERE IN THE

SOUTH AMERICAN JUNGLES, SMUGGLING, STEALING, ROBBING, RAPING, PILLAGING, MODERN-DAY VIKINGS OR PIRATES."

DR. COONS, HOW WOULD EACH ONE OF THOSE TWO PASSAGES I READ TO YOU FIT INTO THAT TYPE OF BEHAVIOR THAT YOU'VE BEEN TALKING ABOUT?

MR. SPENCE: YOUR HONOR, I DON'T BELIEVE THAT'S THE PROPER PREDICATE FOR A HYPOTHETICAL QUESTION. I WOULD OBJECT TO THAT.

THE COURT: I DON'T THINK HE PLACED A HYPOTHETICAL QUESTION, MR. SPENCE. DO YOU WANT TO RESTATE YOUR OBJECTION?

MR. SPENCE: I HAVE NO OBJECTION, YOUR HONOR.

THE COURT: YOU WITHDRAW YOUR OBJECTION?

MR. SPENCE: WITHDRAW THE OBJECTION.

THE COURT: YOU MAY PROCEED.

THE WITNESS: THOSE – THOSE TWO CONCEPTS – WELL, LET'S TAKE THE FIRST. THIS IS – I PRESUME CODY IS A MALE, AND THIS IS A DESIRE FOR HOMOSEXUAL PEDOPHILIA, SEXUAL INTERACTION WITH CHILDREN OF THE SAME SEX . . . AND A KNOWLEDGE THAT IT'S WRONG, JAIL BAIT, BUT A DESIRE TO DO IT ANYWAY. THAT'S THE FANTASY LIFE OF THE INDIVIDUAL WHO WRITES THAT.

AS REGARDS THE SECOND, "I NEED EXCITEMENT TO FEEL ALIVE. I NEED SOME ACTION," WELL, WHAT'S THE ACTION? [762] I MEAN, IS IT SKIING IN COLORADO, OR IS IT SMUGGLING, STEALING, ROBBING, RAPING, ETCETERA, MODERN-DAY VIKING? WELL IT'S THAT – TO MY WAY OF THINKING, THE FANTASY LIFE OF A SOCIOPATH, THE FANTASY LIFE OF A PERSON WHOSE GOT THAT ON HIS MIND.

Q OKAY. IS THIS OPINION BASED ON YOUR EXPERIENCE AND – TRAINING AND EXPERIENCE AS A PSYCHIATRIST?

A YES, AND PARTICULAR AS REGARDS TO THE CRIMINAL FORENSIC WORK WITH THE CRIMINAL JUSTICE SYSTEM AND FOURTEEN YEARS' WORTH OF ACTUAL EXPERIENCE DOING THAT . . . THOUSANDS OF PEOPLE. YES, THAT'S MY OPINION. AND THAT'S BASED ON THAT EXPERIENCE.

MR. SMITH: PASS THE WITNESS, YOUR HONOR.

MR. SPENCE: YOUR HONOR, AT THIS TIME BEFORE CROSS-EXAMINING DR. COONS, MAY WE BREAK FOR LUNCH?

THE COURT: APPROACH THE BENCH.

[THEREUPON, COUNSEL APPROACHED THE BENCH, AND A DISCUSSION WAS HAD OFF THE RECORD.]

THE COURT: LADIES AND GENTLEMEN OF THE JURY, WHETHER THE FOOD IS HERE OR NOT, WE'RE GOING TO TAKE A BRIEF RECESS PRIOR TO THE CROSS EXAMINATION. AND IF THE FOOD

COMES IN TIME, THEN WE'LL – WE'LL BRING IT IN TO YOU [763] AND EAT. IF IT DOESN'T COME IN TIME, THEN WE'LL GET STARTED BACK AGAIN IN A FEW MINUTES AND PROCEED ON UNTIL THERE'S A GOOD BREAK TIME. THAT'S WHY IT'S A BOX LUNCH. IT WON'T MATTER IF IT'S HOT OR NOT. THANK YOU VERY MUCH.

[RECESS]

[THEREAFTER, THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF ALL PARTIES BUT OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: DO YOU WANT AN OPPORTUNITY TO TALK TO MR. COONS OR SOMEONE ELSE?

MR. SPENCE: SOMEONE ELSE, YOUR HONOR.

THE COURT: THAT'S FINE. I'M GOING TO GIVE YOU ABOUT TEN OR FIFTEEN, TWENTY MINUTES.

MR. SPENCE: THANK YOU.

THE COURT: I'M GOING TO SAY, "FIFTEEN MINUTES," BUT I'LL GIVE YOU MORE IF YOU NEED.

YOU CAN PUT MR. COLE BACK OVER HERE.

[RECESS]

[THEREAFTER, THE FOLLOWING PROCEEDINGS [764] WERE HAD WITHIN THE PRESENCE AND HEARING OF ALL PARTIES BUT OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: Y'ALL READY TO PROCEED?

MR. SPENCE: YES, YOUR HONOR.

THE COURT: WE'RE ON THE RECORD OUTSIDE THE PRESENCE OF THE JURY. ALL PARTIES ARE PRESENT.

BRING THE JURY IN, PLEASE.

[THEREUPON, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: BE SEATED.

ALL RIGHT. LET THE RECORD REFLECT THAT ALL PARTIES ARE PRESENT. THE JURY IS IN THE BOX. THE STATE HAD COMPLETED DIRECT EXAMINATION OF DR. COONS, AND I BELIEVE THE DEFENDANT HAS HIM ON CROSS. YOU MAY PROCEED.

MR. SPENCE: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. SPENCE:

Q DR. COONS, NOW, YOU SAW TED BACK IN FEBRUARY?

[765] A YES.

Q HOW MUCH TIME DID YOU SPEND WITH HIM?

A SOMETHING OVER TWO HOURS.

Q TWO HOURS?

A NO. SOMETHING OVER TWO HOURS.

Q OVER TWO HOURS. HOW MANY TIMES HAVE YOU SEEN HIM?

A ONE TIME.

Q AND I THINK YOU TESTIFIED AWHILE AGO THAT HE WAS GIVEN A BATTERY OF TESTS?

A YES. IN ADDITION TO THAT, HE WAS.

Q AND WHO WAS THE PERSON THAT GAVE THE TESTS?

A GEORGE PARKER, Ph.D., A CLINICAL PSYCHOLOGIST IN AUSTIN.

Q A PSYCHOLOGIST? IS IT COMMON FOR A PSYCHIATRIST TO RELY ON A PSYCHOLOGIST'S TEST IN HIS WORK-UP?

A YES. IT'S NOT ALWAYS DONE, BY ANY MEANS; BUT IT'S CERTAINLY, AT TIMES, A HELPFUL ADJUNCT.

Q AND I THINK YOU MENTIONED AWHILE AGO THAT TED WAS A SOCIOPATH.

A HE HAS ANTISOCIAL, SOCIOPATHIC, PSYCHOPATHIC – THEY ALL MEAN THE SAME – ESSENTIALLY THE SAME THING – FEATURES TO HIS PERSONALITY, YES.

Q DOES – A "SOCIOPATH," DOES THAT MEAN ONE THING, OR DOES IT MEAN VARIOUS THINGS?

A WELL, IN TERMS OF THE FEATURES THAT I DESCRIBED, THOSE ARE THE – I WAS ASKED WHAT

ARE THE FEATURES THAT I SAW IN HIM [766] THAT INDICATE TO ME THAT HE HAS THOSE FEATURES . . .

MR. SPENCE: I HAVE NO –

THE WITNESS: . . . THAT THOSE –

MR. SPENCE: – FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ANYTHING ELSE?

REDIRECT EXAMINATION

BY MR. SMITH:

Q DR. COONS, WOULD YOU DEFINE "SOCIOPATH"?

A WELL, IT BEGAN WITH THE TERM "PSYCHOPATH." THEN WE MOVED TO "SOCIOPATH" OR "SOCIOPATHIC PERSONALITY." THEN WE MOVED TO "ANTISOCIAL PERSONALITY DISORDER." AND THESE ARE A PERSONALITY TYPE. LIKE, AN EXCESSIVE, COMPULSIVE PERSONALITY IS ONE WHO HAS EVERYTHING ORDERLY AND NEAT AND TO A – TO AN EXCESS.

AND THEN YOU CAN HAVE PEOPLE WHO ARE DEPENDENT PERSONALITIES, WHO ARE DEPENDENT ON OTHER PEOPLE FOR THEIR EMOTIONAL WELL-BEING. YOU CAN HAVE . . . WELL, DIFFERENT TYPE PERSONALITY DISORDERS. SOCIOPATHIC OR PSYCHOPATHIC OR ANTISOCIAL PERSONALITY IS A TYPE OF DISORDER. WHAT IT MEANS IS PERSONALITY PATTERNS OVER THE YEARS THAT HAVE CERTAIN FEATURES.

AND I DIDN'T BRING MY DSM-III-R WITH ME, WHICH IS THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, [767] THIRD EDITION, REVISED AS OF, I BELIEVE, 1987. BUT IT HAS A NUMBER OF FEATURES. IF YOU'RE GOING TO MAKE THE FIRM DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER, THEN – THEN YOU FULFILL THOSE PARTICULAR CRITERIA THAT ARE LISTED IN DSM-III-R.

Q WHAT ARE SOME OF THOSE CRITERIA?

A OH, GOSH. OH, LET'S THINK HERE.

THEY TALK ABOUT THEM BEFORE THE AGE OF FIFTEEN THAT THEY HAVE TRUANCY, THEY HAVE CERTAIN PROBLEMS THAT – I MEAN, I – I DON'T RECALL ALL OF THEM, BUT THEY LIST CERTAIN THINGS THAT OCCUR BEFORE FIFTEEN; THEY LIST CERTAIN THINGS THAT OCCUR AFTER FIFTEEN . . . BASICALLY, SEXUAL INFIDELITY, THINGS OF THAT NATURE . . . INJURY TO OTHER PERSONS, ETCETERA.

KIND OF THE CLASS THINKING ABOUT THE SOCIOPATHIC PERSONALITY IS THE – IS THAT THEY HAVE – THAT THEY DO ACTS AGAINST SOCIETY AND THAT THEY DON'T PROFIT FROM THEIR EXPERIENCES. THEY DON'T LEARN FROM EXPERIENCE. THEY JUST KEEP ON DOING THESE THINGS BECAUSE THEY WANT TO. THEY DON'T FEEL REMORSEFUL OR GUILTY ABOUT WHAT THEY'VE DONE. IT'S A – IT'S A PERSONALITY PATTERN, AS OPPOSED TO JUST A SHORT-TERM PROBLEM. IT'S A FEATURE OF THEIR PERSONALITY.

MR. SMITH: PASS THE WITNESS, YOUR HONOR.

THE COURT: ANYTHING ELSE?

[768] MR. SPENCE: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: STEP DOWN.

MAY THIS WITNESS BE EXCUSED, OR DO YOU INTEND TO CALL HIM AT A LATER TIME?

MR. FOHN: ASK HIM TO REMAIN FOR A LITTLE WHILE, YOUR HONOR.

THE COURT: ALL RIGHT. DR. COONS, JUST STEP OUTSIDE.

CALL YOUR NEXT WITNESS.

<STATE RESTS>

MR. SMITH: YOUR HONOR THE STATE WOULD REST AT THIS TIME.

* * *

THE COURT: DEFENDANT . . . ?

MR. SPENCE: DEFENDANT'S READY, YOUR HONOR.

THE COURT: WOULD YOU LIKE TO MAKE AN OPENING STATEMENT?

MR. SPENCE: NO, YOUR HONOR. WE'D WAIVE OPENING STATEMENT.

THE COURT: THE RECORD WOULD REFLECT THAT THE DEFENDANT HAS WAIVED AN OPENING STATEMENT.

* * *

[769] NANCY DORIS HICKEY

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q MS. HICKEY, WOULD YOU STATE YOUR NAME FOR THE RECORD, PLEASE?

[770] A "NANCY DORIS HICKEY."

Q MS. HICKEY, ARE YOU THE MOTHER OF TED CALVIN COLE?

A I AM.

Q WHEN WAS TED BORN?

A 1956, GOODFELLOW AIR FORCE BASE, SAN ANGELO, TEXAS.

Q IN 1956?

WHO – WHO IS TED'S FATHER?

A CHARLES CALVIN COLE.

WHERE IS MR. COLE AT THE PRESENT TIME?

A I HEARD FROM MY DAUGHTER THAT HE WAS IN RED BLUFF, A SUBURBS [SIC] OF DALLAS.

Q NOW, AT THE TIME OF TED'S BIRTH, WERE YOU AND MR. COLE LIVING TOGETHER? WERE Y'ALL MARRIED –

A YES.

Q – AT THAT TIME?

A YES.

Q WAS TED'S FATHER – WAS HE EVER CHARGED WITH ANY TYPE OF CRIMINAL OFFENSES OR CONVICTED OF ANY CRIMINAL OFFENSES?

A YES. WHEN WE LIVED IN SACRAMENTO, HE – HE WASN'T CONVICTED. HE WAS – HE TRIED TO ROB A LIQUOR STORE WHERE WE'D BEEN BUYING LIQUOR FOR THREE YEARS; WENT IN THERE WITH HIS FATIGUES ON WITH HIS NAME TAG ON IT.

Q AND WHERE WAS THIS AT?

A SACRAMENTO.

THAT'S WHEN THE AIR FORCE DECIDED THAT IF HE WANTED [771] OUT, THEY'D LET HIM OUT AND GAVE HIM A GENERAL DISCHARGE.

Q HOW LONG DID YOU AND MR. COLE LIVE TOGETHER?

A OFF AND ON, FOR TEN YEARS.

Q FOR TEN YEARS. NOW, WHEN TED WAS AROUND THE AGE OF FIVE OR SIX, DID HE CONTINUE TO LIVE WITH YOU AT THAT TIME?

A NO. MY HUSBAND HAD DESERTED US SEVERAL TIMES. AND WHEN TED WAS FIVE, I HAD NO

IDEA WHERE HIS FATHER WAS. AND I WAS WORKING IN A BEER JOINT FOR THREE DOLLARS A DAY AND HAD TWO KIDS TO FEED. AND IT WAS TIME FOR TED TO START TO SCHOOL, AND I KNEW I COULDN'T HANDLE IT. SO I CALLED MY BROTHER IN OKLAHOMA, AND HE CAME AND GOT ME AND THE KIDS AND TOOK ME TO MY PARENTS.

Q YOUR PARENTS LIVE IN OKLAHOMA?

A YES. THEY LIVED TOGETHER AT THAT TIME. THEY WERE BOTH ALCOHOLICS. THEY DIDN'T WANT US THERE EITHER, BUT THEY . . . YOU KNOW, WHAT COULD THEY DO? THEY LIVED IN COMPANY HOUSING AREA ABOUT EIGHT MILES OUT OF TOWN. TED WAS THE ONLY CHILD OUT THERE. THE SCHOOL BUSES DIDN'T RUN. AND MY FATHER INFORMED ME IN NO UNCERTAIN TERMS I WOULD NOT USE HIS CAR TO TAKE THAT KID TO SCHOOL AND BACK, TO DO SOMETHING ELSE.

Q AFTER YOU TOOK TED AND HIS BROTHER TO OKLAHOMA –

A TED AND HIS SISTER.

Q TED AND HIS SISTER – DID YOU PLACE THEM IN A HOME UP THERE?

[772] A YES.

Q BOTH OF THEM?

A NO, JUST MY SON.

Q JUST TED?

A I KEPT THE BABY GIRL WITH ME.

Q WHAT – WAS IT AN ORPHANS' HOME, OR WHAT TYPE OF PLACE WAS IT?

A IT'S A CHURCH OF CHRIST CHILDREN'S HOME. YOU HAVE TO GO THROUGH THE DEACONS OF THE CHURCH TO GET A CHILD IN AND THROUGH THE DEACONS OF THE CHURCH TO GET A CHILD OUT. I WAS RAISED IN THE CHURCH OF CHRIST, AND MY UNCLE WAS AN ELDER IN THE CHURCH OF CHRIST, AND MY MOTHER WAS A MEMBER THERE, AND THEY –

Q WERE YOU AN ACTIVE MEMBER OF THE CHURCH AT THAT TIME?

A NO. I WAS A DRUNK.

Q YOU PLACED TED IN TIPTON'S CHILDREN'S HOME –

A YES.

Q – IN OKLAHOMA?

A I DID.

Q AND HOW OLD WAS HE AT THIS TIME?

A FIVE, ALMOST SIX. I PUT HIM THERE SO THAT HE WOULD BE ABLE TO START TO SCHOOL WHEN HE WAS SIX.

Q HOW LONG DID HE REMAIN IN THE HOME?

A FIVE YEARS.

Q HOW MANY TIMES DID YOU SEE HIM DURING THAT FIVE YEARS?

[773] A TWICE.

Q NOW, DOES HE HAVE AN AUNT AND UNCLE THAT LIVE IN OKLAHOMA?

A YES, MY BROTHER AND SISTER-IN-LAW. THEY WERE CONSIDERED HIS SPONSORS. THE SPONSORS WERE THE ONES THAT KEPT THE KIDS IN CLOTHING.

Q DID YOU HAVE ANY OTHER CHILDREN?

A YES. I HAD TWO OTHERS.

Q WHAT WERE THEIR NAMES?

A "KEITH EDWARD" AND "CARLA KATHRYN." KEITH WAS THE SECOND CHILD AND –

Q IS KEITH A LITTLE YOUNGER THAN TED?

A THREE YEARS.

Q NOW, WHERE IS – WHERE WAS KEITH LIVING AT THIS TIME?

A WITH MY BROTHER AND SISTER-IN-LAW. THEY HAD LEGALLY ADOPTED HIM AT THAT TIME.

Q YOU HAD GIVEN KEITH UP?

A YES . . . WHEN HE WAS TWO.

Q WOULD TED GO FROM THE CHILDREN'S HOME OVER TO HIS AUNT AND UNCLE'S HOUSE TO VISIT AND –

A YES. SINCE THEY WERE HIS SPONSORS, THEY HAD VISITING PRIVILEGES. HE COULD GO THERE DURING THEIR SUMMER VACATION, CHRISTMAS, ANY HOLIDAYS THAT THEY HAD. THEY

HAD THE PRIVILEGE OF TAKING THEM BECAUSE THEY WERE HIS SPONSORS.

Q NOW, I THINK YOU MENTIONED THAT TED STAYED THERE – HOW [774] LONG? FIVE YEARS?

A FIVE YEARS.

Q AND HE WAS HOW OLD WHENEVER HE GOT OUT?

A TEN, ALMOST ELEVEN.

Q DID HE COME TO LIVE WITH YOU AT THAT TIME?

A YES.

Q HERE IN SAN ANGELO?

A YES.

Q WHERE WAS HIS FATHER?

A I – I DON'T KNOW. I THINK GRAND PRAIRIE.

Q NOW, AFTER TED CAME BACK TO LIVE WITH YOU HERE IN SAN ANGELO, WHAT TOOK PLACE OVER THE NEXT SEVERAL YEARS?

A WELL, I HAD REMARRIED. MY HUSBAND AND I HAD TURNED OUR LIVES AROUND COMPLETELY. WE HAD STARTED TO CHURCH, BUT HE WOULDN'T GO TO THE CHURCH OF CHRIST; SO I JOINED THE FUNDAMENTAL BAPTIST CHURCH WITH HIM. I WOULD HAVE GONE ANYPLACE THAT HE WANTED TO GO TO GET IN CHURCH.

Q YOU'RE TALKING ABOUT YOUR HUSBAND NOW?

A MY HUSBAND. WE HAD, AS I SAID, TOTALLY TURNED OUR LIVES AROUND. WE HAD QUIT DRINKING. WE DECIDED WE WERE GOING TO STAY AT HOME AND RAISE THE KIDS. WE WERE TRYING TO PROVE THAT WE WERE FIT SO THAT WE COULD GET TED OUT.

Q IT DIDN'T TURN OUT QUITE THAT WAY, THOUGH, DID IT?

A WELL, THE ELDERS OF THE CHURCH HERE, THEY CAME OUT THREE DIFFERENT TIMES AND DECIDED WE HADN'T BEEN MARRIED LONG [775] ENOUGH, HADN'T WORKED LONG ENOUGH IN THE CHURCH. MY HUSBAND WAS A SUNDAY-SCHOOL TEACHER AND THE CHURCH TREASURER. I WAS THE CHURCH SECRETARY. AND FINALLY, I WENT BACK TO OKLAHOMA TO THE JUDGE THAT HELPED ME GET TED UP THERE, AND HE HELPED ME GET HIM OUT SO HE COULD COME AND LIVE WITH US. WE HAD BEEN MARRIED THREE YEARS AT THAT TIME.

Q SO HE CAME BACK TO SAN ANGELO AND LIVED WITH YOU –

A YES.

Q – AND YOUR HUSBAND?

A YES. AND MY DAUGHTER.

Q AND YOUR DAUGHTER. WHAT'S YOUR DAUGHTER'S NAME?

A "CARLA KATHRYN COLE."

Q OKAY. YOU CALL HER "CATHY"?

A "CATHY."

Q NOW, AFTER YOU BROUGHT TED BACK TO SAN ANGELO, DID YOU ENROLL HIM IN SCHOOL?

A YES.

Q WHERE AT?

A SAN JACINTO.

Q OKAY. WHAT KIND OF GRADES DID TED MAKE WHILE HE WAS IN SCHOOL?

A HE MADE --

Q DO YOU REMEMBER?

A – PRETTY GOOD GRADES. YEAH.

[776] Q DID HE HAVE ANY – DID HE GET IN TROUBLE WITH THE LAW IN THE NEXT FEW YEARS FROM THE TIME THAT YOU BROUGHT HIM BACK TO SAN ANGELO UP UNTIL FIVE YEARS LATER?

A NO.

Q NO PROBLEM AT ALL?

A TED WAS NEVER A PROBLEM AT ALL. HE WAS – HE TRIED TO BE A PERFECT CHILD. THAT'S WHAT WE EXPECTED OF HIM, AND THAT'S WHAT HE TRIED TO BE.

Q WHEN WAS THE NEXT TIME THAT TED SAW HIS FATHER?

A I DON'T REMEMBER THE YEAR. I THINK TED WAS EITHER FOURTEEN OR ALMOST FIFTEEN. AND

HIS STEP-GRANDFATHER, HIS FATHER'S STEPFATHER, DIED AT ROBERT LEE. WE HAD STAYED IN CLOSE CONTACT WITH THE GRANDPARENTS. AND I DEBATED WHETHER OR NOT TO TAKE TED UP THERE TO THE FUNERAL AND DECIDED THAT HE WAS OLD ENOUGH AND, YOU KNOW, HE WAS CLOSE TO THEM; AND I TOOK HIM UP THERE TO THE FUNERAL. AND HIS FATHER WAS THERE. FIRST TIME HE'D SEEN HIM SINCE HE WAS FIVE.

Q HE HADN'T SEEN HIS FATHER IN TEN YEARS?

A NO. THE LAST TIME HE SAW HIS FATHER, HIS FATHER BROUGHT HIM TO SAN ANGELO. HE HAD TOOK HIM OFF TO ABILENE AND BROUGHT HIM IN SAN ANGELO AND DROPPED HIM OFF A BLOCK FROM WHERE HE THOUGHT I LIVED AND SAID, "YOUR MOTHER LIVES DOWN IN THAT BLOCK. GO FIND HER," AND DROVE OFF. THAT'S THE LAST TIME HE HAD SEEN HIS FATHER.

[777] Q AND THE NEXT TIME HE SAW HIM WAS AT –

A AT THE FUNERAL.

Q AT THE FUNERAL.

A AND HIS FATHER TOLD HIM, "HAD I KNOWN WHERE YOU WERE ALL THESE YEARS, YOU WOULD HAVE BEEN WITH ME, YOU KNOW." OF COURSE, HE KNEW BECAUSE WE WERE IN CLOSE CONTACT WITH HIS MOTHER AND STEPFATHER. BUT HE LET TED BELIEVE – AND HE WAS ENROLLED AT A SEMINARY AT THAT TIME, ABOUT TO BE A PREACHER,

AND HAD ALREADY BEEN MARRIED FOUR TIMES, BUT THEY DIDN'T KNOW THAT.

ANYWAY, ABOUT TWO WEEKS AFTER THAT, TED'S GRANDMOTHER CAME BY AND SAID SHE WAS GOING TO VISIT CHARLES, COULD TED GO UP THERE FOR A WEEK. WELL, HE WAS OLD ENOUGH THAT I –

THE COURT: YOU'RE GOING TO HAVE TO PUT THIS ON A QUESTION-AND-ANSWER BASIS.

MR. SPENCE: OKAY.

THE WITNESS: I'M SORRY.

THE COURT: THIS IS AN IMPROPER MANNER OF QUESTIONING.

MR. SPENCE: I UNDERSTAND, YOUR HONOR.

BY MR. SPENCE:

Q YOU LET TED GO TO DALLAS TO SEE HIS FATHER?

A YES.

[778] Q HOW LONG DID HE STAY IN DALLAS?

A ALMOST A YEAR.

Q WITH HIS FATHER?

A YES.

Q DID YOU SEE HIM IN THAT YEAR'S TIME?

A NO.

Q WAS HE A DIFFERENT PERSON WHEN HE CAME BACK?

A NOT OUTWARDLY.

Q HAS TED EVER BEEN AN EMOTIONAL-TYPE PERSON WITH – THAT SHOWS HIS EMOTIONS?

A NEVER.

Q ARE YOU THAT TYPE OF PERSON? DO YOU SHOW YOUR EMOTIONS?

A NEVER.

Q NOW, AFTER TED CAME BACK FROM LIVING IN DALLAS WITH HIS FATHER, HE CAME BACK TO LIVE WITH YOU?

A YES.

Q WAS HE WORKING?

A YES, HE WENT TO WORK.

Q WHERE WAS HE WORKING?

A IT WAS CALLED "WINN DIXIE THEN. IT'S NOW . . .

Q HOW LONG DID HE REMAIN AT THAT JOB?

A ABOUT THREE MONTHS, THE BEST I RECALL.

Q WERE THERE ANY PROBLEMS WITH THE LAW?

A NO.

Q HOW OLD WAS HE AT THIS TIME?

[779] A SIXTEEN.

Q SIXTEEN.

DID YOU KNOW A PERSON BY THE NAME OF "GARY DEDEKER"?

A YES.

Q WAS TED AND MR. DEDEKER GOOD FRIENDS?

A YES.

Q I BELIEVE WHEN TED WAS SIXTEEN, HE WAS CHARGED WITH THE MURDER OF GARY DEDEKER.

A YES.

Q WAS THERE A TRIAL THAT TOOK PLACE OVER THAT?

A YES.

Q HOW DID THAT TRIAL RESULT – WHAT WAS THE RESULT OF THAT TRIAL?

A A HUNG JURY.

Q A HUNG JURY. WELL, HOW WAS TED CONVICTED OF MURDER?

A CAN I EXPLAIN?

Q YES, PLEASE.

MR. ALCALA: YOUR HONOR, I OBJECT TO THAT SINCE IT'S NOT RESPONSIVE. SHE DIDN'T EVEN – SHE DIDN'T ANSWER THE QUESTION THAT NEEDED EXPLAINING. WE OBJECT.

THE COURT: MR. SPENCE, WE'RE GOING TO KEEP THIS ON A QUESTION-AND-ANSWER BASIS. THE LAW DOES NOT ALLOW A NARRATIVE TESTIMONY. SO YOU MUST KEEP IT ON A QUESTION-AND-ANSWER BASIS.

[780] MR. SPENCE: ALL RIGHT.

BY MR. SPENCE:

Q WAS TED CONVICTED OF MURDER, MS. COLE – MS. HICKEY?

A HE PLEADED "GUILTY" TO MURDER.

Q DO YOU KNOW WHY HE PLEAD "GUILTY"?

THE COURT: MR. SPENCE – SEND THE JURY OUT.

[THEREUPON, THE JURY WAS RETIRED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

MR. SPENCE: YOUR HONOR, WE'LL WITHDRAW THE – THE QUESTION, YOUR HONOR, AND REASK IT.

THE COURT: MR. SPENCE, THE JURY IS NOT IN THE ROOM, THEY HAVE BEEN WITHDRAWN.

AN INDIVIDUAL PLEADS "GUILTY" BECAUSE THEY ARE GUILTY AND FOR NO OTHER REASON. IF ANY PARTY EVER ENTERS A PLEA OTHER THAN THAT, IT IS AN IMPROPER PLEA.

MR. SPENCE: I UNDERSTAND.

THE COURT: NOW, ARE YOU TELLING – ARE YOU ATTEMPTING TO ATTACK THAT CONVICTION OF 1970-WHATEVER?

MR. SPENCE: NO, I'M NOT ATTEMPTING TO ATTACK

[781] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

THAT CONVICTION, YOUR HONOR.

THE COURT: ALL RIGHT. FOR WHAT PURPOSE ARE YOU ASKING THAT QUESTION?

MR. SPENCE: I WILL WITHDRAW THAT QUESTION.

THE COURT: NOW, IF YOU HAVE A PROPER PURPOSE, I WILL ALLOW YOU TO ASK THE QUESTION, BUT YOU'RE GOING TO HAVE TO TELL ME WHAT THE PURPOSE IS. AND I'M JUST TELLING YOU, I'M NOT RESTRICTING YOU – I'M NOT GOING TO RESTRICT YOU FROM ASKING THE QUESTION IF YOU GIVE ME A PROPER PURPOSE.

MR. SPENCE: WELL, YOUR HONOR, I CAN SHOW THE PURPOSE FOR THE PLEA OF "GUILTY," AND THAT IS THE FACT THAT HE WAS GUILTY OF SHOOTING MR. DEDEKER.

MR. ALCALA: YOUR HONOR –

MR. FOHN: YOUR HONOR –

MR. SMITH: YOUR HONOR –

MR. SPENCE: BUT I CAN GO – WELL . . .

THE COURT: WELL, LET'S KEEP – THAT'S FINE. WE'RE OUTSIDE THE PRESENCE OF THE JURY. I'M RELATIVELY – I'M TRYING TO BE AS FLEXIBLE AS POSSIBLE.

MR. SPENCE: I WOULD LIKE TO GO INTO – WELL, I'LL WITH – I'LL WITHDRAW THE QUESTION AS TO THE PLEA OF "GUILTY." I'D LIKE TO GO INTO THE REASON FOR THE

[782] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

SHOOTING.

THE COURT: THE REASONS FOR THE SHOOTING ... NOW, I HAVE A STIPULATION OF EVIDENCE THAT'S BEEN ADMITTED. OKAY? NOW, THAT STIPULATION SETS OUT THE INCIDENT AS IT OCCURRED. IF THAT IS AN ATTACK UPON THAT STIPULATION, THEN I HAVE GREAT DIFFICULTY. THAT'S NUMBER ONE. NUMBER TWO, ANY TESTIMONY SHE HAS AS TO THE REASON FOR THE SHOOTING IS GOING TO BE HEARSAY –

MR. FOHN: HEARSAY.

THE COURT: – AND, THEREFORE, IT'S NOT ADMISSIBLE.

NOW, CERTAIN HEARSAY MATTERS ARE ADMISSIBLE AS TO OPINIONS AND THINGS OF THAT NATURE. AND I'M GOING TO GIVE YOU BROAD – I'M GOING TO GIVE YOU A BROAD BERTH IN REFERENCE TO THE AREA OF THE ISSUE OF PUNISHMENT IN A CAPITAL MURDER CASE. I'LL GIVE YOU EVERYTHING I CAN GIVE YOU, MR. SPENCE, JUST AS I'LL GIVE THE STATE EVERY – EVERY OPPORTUNITY

THAT THEY CAN HAVE WITHIN THE CONFINES OF THE RULES OF EVIDENCE THAT EXIST IN THE STATE OF TEXAS.

NOW, I DON'T SEE HOW YOU'RE GOING TO GET INTO THAT BASED UPON HEARSAY, BUT IF YOU CAN TELL ME HOW YOU'RE GOING TO GET THERE AND WHERE YOU'RE GOING TO, THEN I'LL CERTAINLY ALLOW IT. I'M NOT TRYING TO – I WANT YOU TO

[783] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

BE ABLE TO DO THE VERY BEST YOU CAN FOR YOUR CLIENT AND PUT ON WHATEVER YOU BELIEVE IS NECESSARY FOR – IN YOUR CLIENT'S INTEREST. BUT THAT'S HEARSAY.

MR. SPENCE: I CANNOT GET THERE FROM HERE, YOUR HONOR.

THE COURT: WELL, THAT'S RANK HEARSAY.

MR. SPENCE: I UNDERSTAND THAT.

THE COURT: SO YOU GO THE WAY YOU WANT TO GO IN REFERENCE TO THAT. BUT IF WE'RE IN REFERENCE TO AN ATTACK OF A JUDGMENT THAT'S ENTERED, A PLEA OF "GUILTY" IS ENTERED BECAUSE AN INDIVIDUAL IS GUILTY AND FOR NO OTHER REASON. THAT'S WHAT THE LAW REQUIRES. THAT'S WHY THIS COURT DOESN'T TAKE NOLO CONTENDERE PLEAS UNLESS THE PERSON SAYS THEY'RE GUILTY.

MR. SPENCE: I UNDERSTAND, YOUR HONOR.

THE COURT: BRING THE JURY BACK IN.

[THEREUPON, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: BE SEATED.

[784] LET'S PROCEED. PRIOR TO SENDING THE JURY OUT, YOU HAD THE WITNESS ON EXAMINATION –

MR. SPENCE: THANK YOU, YOUR HONOR.

THE COURT: – MR. SPENCE. YOU MAY PROCEED.

DIRECT EXAMINATION [RESUMED]

BY MR. SPENCE:

Q MS. HICKEY, DID TED PLEAD "GUILTY" TO THAT MURDER CHARGE IN 1974 –

A YES, HE DID.

Q – OF GARY DEDEKER?

AT THAT TIME HIS FATHER WAS IN DALLAS?

A GRAND PRAIRIE.

Q IN GRAND PRAIRIE.

I BELIEVE THERE – WAS THERE A CAR OR ANYTHING TAKEN AFTER THAT SHOOTING?

A YES.

Q WHERE DID TED GO IN THE CAR?

A TO HIS FATHER.

Q AND THEN HE WAS BROUGHT BACK HERE TO SAN ANGELO TO STAND TRIAL?

A LATER IN THE WEEK.

Q AFTER TED WENT TO PRISON, DID YOU GO AND SEE HIM IN PRISON?

A YES.

[785] Q HOW MANY TIMES? DO YOU KNOW?

A I DON'T KNOW. I WENT FOR HIS GRADUATION, MOTHER'S DAYS, THE DAYS THAT I COULD – THE WEEKENDS THAT I COULD GET THE MONEY TOGETHER. I FOUND A WOMAN IN CISCO WHO HAD A HUSBAND DOWN THERE, AND WE STARTED GOING TOGETHER SO WE COULD GO MORE OFTEN. I WENT AS OFTEN AS I COULD POSSIBLY GO.

Q TED GOT OUT OF PRISON IN WHAT YEAR? 1980?

A YES.

Q HE CAME BACK TO SAN ANGELO TO LIVE?

A YES.

Q WHO WAS HE LIVING WITH AT THAT TIME?

A ME.

Q WHERE WAS HE WORKING?

A HE WENT TO WORK FOR WESTERN IRON WORKS.

Q HOW LONG DID HE WORK THERE?

A TWO YEARS.

Q THEN WHERE DID HE GO?

A HIS FATHER CAME DOWN AND INVITED HIM TO COME AND LIVE WITH HIM AT DALLAS; HE COULD FIND HIM A BETTER JOB UP THERE.

Q HOW LONG WAS HE UP THERE?

A TWO YEARS. I'M – I'M NOT SURE.

Q HOW MANY CHILDREN DO YOU HAVE ALTOGETHER, MS. HICKEY?

A I HAVE FOUR LIVING.

Q FOUR LIVING CHILDREN. WHERE ARE THEY AT AT THE PRESENT [786] TIME?

A PARDON ME?

Q TED IS HERE ON CAPITAL MURDER CHARGES. WHERE ARE THE REST OF THEM?

A MY BABY BOY, MICHAEL HICKEY, IS IN COUNTY JAIL ON A MURDER CHARGE. MY SECOND OLDEST SON IS LIVING IN OKLAHOMA. HE'S THE ONE THAT WAS ADOPTED BY MY BROTHER AND SISTER-IN-LAW. AND MY DAUGHTER IS IN ABILENE.

Q NOW, I BELIEVE KEITH IS THE ONE IN – IN OKLAHOMA; IS THAT CORRECT?

A YES.

Q HAS HE EVER BEEN IN TROUBLE WITH THE POLICE OR WITH THE LAW?

A YES.

Q WHAT KIND OF CHARGE?

A ATTEMPTED MURDER.

Q WHERE WAS THIS?

A IN OKLAHOMA.

Q AND I BELIEVE THAT KELLY HICKEY IS YOUR DAUGHTER-IN-LAW.

A YES.

Q AND SHE'S IN JAIL AT THE PRESENT TIME ON CAPITAL MURDER CHARGES?

A YES.

Q DO YOU HAVE ANOTHER SON-IN-LAW BY THE NAME OF – WHAT IS HIS NAME?

[787] A "LESLIE MARSH."

Q IS HE IN JAIL AT THE PRESENT TIME?

A YES.

Q WHAT IS THE CHARGE?

A CAPITAL MURDER.

MR. SPENCE: I HAVE NO FURTHER QUESTIONS.

MR. ALCALA: THE STATE HAS –

THE COURT: DO YOU HAVE ANY QUESTIONS OF THIS WITNESS?

MR. ALCALA: THE STATE HAS NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

[THEREUPON, THE WITNESS WAS EXCUSED FROM THE WITNESS STAND.]

THE COURT: CALL YOUR NEXT WITNESS.

MR. SPENCE: CALL BARBARA DEAN, YOUR HONOR.

THE COURT: BARBARA DEAN?

MR. SPENCE: DEAN.

THE COURT: I'M NOT TRYING TO RESTRICT YOU, MR. SPENCE. HOW MANY WITNESSES DO YOU THINK YOU'RE GOING TO HAVE? I'M JUST TRYING TO WORK OUT MY TIME FRAME.

MR. SPENCE: I'VE GOT FOUR, YOUR HONOR.

[788] THE COURT: ALL RIGHT. FOUR MORE?

MR. SPENCE: FOUR, YES, SIR.

THE COURT: FOUR MORE. ALL RIGHT.

COME FORWARD, MA'AM, AND BE SEATED. HAVE YOU BEEN PREVIOUSLY SWORN?

MR. SPENCE: NO, YOUR HONOR.

MS. BARBARA DEAN: YES.

THE COURT: I BELIEVE SHE HAS BEEN PREVIOUSLY SWORN.

MR. SPENCE: YEAH. SHE WAS THIS MORNING, AND I –

THE COURT: AND THE COURT EXPLAINED TO YOU THE RULE, DID IT NOT?

MS. BARBARA DEAN: YES, SIR.

THE COURT: YOU MAY PROCEED.

THEREUPON,

BARBARA ANN DEAN

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q MS. DEAN, WHAT IS YOUR FULL NAME?

A "BARBARA ANN DEAN."

[789] Q OKAY. AND WHERE DO YOU LIVE?

A IN DUNCAN, OKLAHOMA.

Q IN DUNCAN, OKLAHOMA?

A YES, SIR.

Q ARE YOU THE LEGAL PARENT OF TED COLE'S BROTHER?

A YES, I AM.

Q WHAT IS HIS NAME?

A "KEITH EDWARD DEAN."

Q "KEITH DEAN." WAS HE LEGALLY ADOPTED BY YOU AND YOUR HUSBAND?

A YES, SIR.

Q WHERE WAS THIS – WHERE. DID THIS TAKE PLACE AT?

A IN DUNCAN.

Q IN DUNCAN, OKLAHOMA?

A YES, SIR.

Q WHEN?

A IN 1962.

Q NOW, CAN YOU GO BACK TO THE TIME WHEN TED WAS AT THE TIPTON'S HOME IN OKLAHOMA? WHAT – HOW OLD WAS HE WHENEVER HE WENT TO THAT ORPHAN'S HOME?

A WELL, HE WAS ALMOST SIX. IT WAS JUST BEFORE HIS SIXTH BIRTHDAY.

Q HOW LONG DID HE STAY THERE?

A FOUR YEARS.

Q FOUR YEARS? NOW, DURING THIS FOUR-YEAR PERIOD THAT HE [790] WAS THERE, DID HE EVER COME TO VISIT WITH YOU AND YOUR HUSBAND?

A YES, SIR. WE WERE HIS – I – YOU WOULDN'T CALL IT "GUARDIANS," BUT AT TIPTON THEY TRY TO HAVE A FAMILY SUPPORT THE CHILDREN THAT

ARE THERE. AND WE SUPPORTED TED AT THAT TIME WITH CLOTHES AND TOOK HIM TO OUR HOME FOR VACATIONS AND CHRISTMAS TIMES AND SUCH.

Q WAS KEITH AT YOUR HOME AT THIS TIME WHENEVER TED WOULD COME TO VISIT YOU?

A YES, SIR.

Q AND KEITH WAS TED'S FULL BROTHER?

A YES.

Q DID TED EVER SHOW ANY EMOTION OR ANY FEELINGS OF ANY KIND ABOUT THESE VISITS?

A NO, SIR. AT THE TIME THE BOYS WOULD HAVE A REAL GOOD TIME WHILE TEDDIE WAS THERE, BUT WHEN WE WOULD TAKE HIM BACK, IT WAS JUST LIKE – HE SHOWED NO EMOTIONS OF WANTING TO STAY WITH US OR WANTING TO GO BACK. IT WAS . . .

Q DO YOU KNOW TED'S FATHER, CHARLES COLE?

A YES, SIR.

Q DID HE EVER ATTEMPT TO SEE HIM WHILE HE WAS IN THE CHILDREN'S HOME THERE IN –

A NOT TO MY KNOWLEDGE.

Q – IN OKLAHOMA?

HAVE YOU AND YOUR HUSBAND TRIED TO ADOPT TED?

[791] A WE DID AT ONE TIME JUST BEFORE NANCY, HIS MOTHER, TOOK HIM OUT OF TIPTON HOME. WE FELT LIKE THAT – THAT WE COULD HANDLE IT, BUT AT THAT TIME – I DON'T KNOW WHAT YOU WANT ME TO SAY – I MEAN, HOW MUCH. BUT THERE WAS SOME STIPULATIONS.

Q OKAY. WHAT – WERE THERE SOME STIPULATIONS?

A YES. THEY SAID IF WE ADOPTED HIM, THEN WE'D HAVE TO PROMISE THAT HE WOULD BE IN CHURCH THREE TIMES A WEEK WITH NO EXCEPTION. AND WE TOLD THEM WE DIDN'T KNOW IF WE COULD PROMISE THAT OR NOT.

Q SO THAT ADOPTION NEVER WENT THROUGH?

A NO. WHEN WE TALKED TO NANCY ABOUT IT RIGHT AFTER WE GOT HOME FROM TALKING TO THEM, SHE SAID THAT SHE WANTED TO GET HIM OUT, AND SO SHE STARTED PROCEEDINGS HERSELF.

Q NOW, YOUR SON, KEITH, CAME BACK TO TEXAS TO VISIT WITH HIS MOTHER, I BELIEVE, AT ONE TIME?

A YES, SIR, WHEN HE –

Q WHEN WAS THAT?

A – WAS FIFTEEN.

Q WHEN HE WAS FIFTEEN?

A YES, SIR.

Q DID HE GET IN TROUBLE HERE IN SAN ANGELO?

A NOT TO MY KNOWLEDGE.

Q OKAY.

A I DON'T REMEMBER THEM – KNOWING ANYTHING ABOUT ANY [792] TROUBLE HERE IN SAN ANGELO.

Q OKAY. WHERE DID HE GET IN TROUBLE AT?

A IN DUNCAN.

Q IN DUNCAN, OKLAHOMA?

A UH-HUH.

Q WHAT WAS THE – WHAT TYPE OF TROUBLE WAS IT?

A OH, MOSTLY WRITING CHECKS, AND HE GOT – LET'S SEE . . . AT ONE TIME HE GOT PICKED UP FOR STEALING.

MR. SPENCE: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: DO YOU HAVE ANY QUESTIONS OF THIS WITNESS?

MR. ALCALA: I HAVE NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

* * *

[800] JARVIS WRIGHT, Ph.D.,

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q MR. WRIGHT, WOULD YOU TELL US SOMETHING ABOUT YOUR EDUCATIONAL BACKGROUND, PLEASE? OR, LET ME BACK UP JUST A LITTLE BIT. IS IT "DOCTOR" WRIGHT?

A YES.

Q YOU DO HAVE A Ph.D.?

A I HAVE A Ph.D.

Q OKAY. DR. WRIGHT, YOU'RE A – YOU LIVE HERE IN SAN ANGELO?

A LIVE HERE IN SAN ANGELO, YES.

Q WOULD YOU TELL US SOMETHING ABOUT YOUR EDUCATIONAL BACKGROUND?

A I'M A PSYCHOLOGIST. I HAVE A BACHELOR'S DEGREE. MY BACHELOR'S IS IN MATH AND PHYSICS. IT'S FROM THE UNIVERSITY – ABILENE CHRISTIAN UNIVERSITY. I HAVE A MASTER'S DEGREE IN PSYCHOLOGY FROM ABILENE CHRISTIAN UNIVERSITY, 1969. IN 1976 I EARNED A Ph.D., DOCTORATE DEGREE, IN PSYCHOLOGY AT THE UNIVERSITY OF SOUTHERN MISSISSIPPI.

[801] Q DO YOU HOLD ANY CERTIFICATIONS OR LICENSES, SIR?

A I'M LICENSED IN THE STATE OF TEXAS, AND I'M LICENSED IN THE STATE OF TENNESSEE AS A PSYCHOLOGIST, I'M LISTED IN THE HEALTH SERVICE PROVIDERS IN PSYCHOLOGY BOTH NATIONALLY AND IN TEXAS.

Q WOULD YOU TELL US SOMETHING ABOUT YOUR EMPLOYMENT BACKGROUND?

A BEGAN WORKING IN PSYCHOLOGY AT THE MASTER'S DEGREE LEVEL AND CONTINUED WORKING UNTIL I WENT BACK FOR MY DOCTORATE DEGREE. I'VE BEEN A PSYCHOLOGIST IN SAN ANGELO SINCE 1977. WORKED FOR A WHILE AT THE UNIVERSITY OF TENNESSEE IN NASHVILLE AS COUNSELLING CENTER DIRECTOR. THIS IS AFTER FINISHING THE DOCTORATE. FINISHED THE DOCTORATE IN 1976. I'VE BEEN SELF-EMPLOYED HERE IN SAN ANGELO IN PRIVATE PRACTICE AS A PSYCHOLOGIST SINCE 1980.

Q ARE YOU THE HOLDER OF ANY AWARDS OR HONORS?

A I'VE BEEN ON SEVERAL COMMITTEES AND THINGS LIKE THIS THROUGH THE STATE. NOT ANY NOBEL PRIZES OR ANYTHING LIKE THAT.

Q OKAY. DR. WRIGHT, HOW DID YOU GET INVOLVED IN THIS CASE TO BEGIN WITH?

A YOU CALLED AND ASKED IF I'D BECOME INVOLVED IN IT.

Q OKAY. HAVE YOU EVER EXAMINED TED COLE?

A YES, I HAVE.

Q WOULD YOU IDENTIFY HIM FOR THE RECORD, SIR?

[802] A TED COLE IS THE PERSON SEATED TO YOUR RIGHT.

MR. SPENCE: YOUR HONOR, WE WOULD HAVE THE RECORD REFLECT THAT DR. WRIGHT IDENTIFIED TED CALVIN COLE.

THE COURT: THE RECORD WOULD SO REFLECT.

PROCEED.

BY MR. SPENCE:

Q WHEN DID YOU FIRST IDENTIFY – EXAMINE MR. COLE?

A FIRST SAW MR. COLE ON MARCH – OR, ON FEBRUARY 25, 1988.

I SAW HIM AGAIN ON SEVERAL OTHER OCCASIONS: MARCH 11, MARCH 22, APRIL 4, APRIL 25, AND FINALLY, ON MAY 17 OF THIS YEAR.

Q HAVE YOU SPENT QUITE A BIT OF TIME WITH HIM ON THOSE VARIOUS OCCASIONS?

A YES, I HAVE. I'D SUPPOSE A TOTAL FACE-TO-FACE TIME SOMEWHERE AROUND EIGHT TO TEN HOURS, SOMETHING IN THAT NEIGHBORHOOD.

Q HAVE YOU CONDUCTED EXAMINATIONS OF HIM –

A YES.

Q – OTHER THAN SPENDING TIME WITH HIM?

A YES, INDEED I HAVE.

Q WHAT HAVE YOU DONE IN THE WAY OF EXAMINING MR. COLE?

A ON THESE VARIOUS OCCASIONS I INTERVIEWED HIM EACH TIME, TALKED WITH HIM AT SOME LENGTH. DURING THIS TIME ALSO, I [803] ADMINISTERED A RATHER EXTENSIVE BATTERY OF PSYCHOLOGICAL TESTS. THESE TESTS INCLUDED THE WECHSLER ADULT INTELLIGENCE SCALE, REVISED. THAT'S A MAJOR INTELLIGENCE TEST. HE SCORED QUITE HIGH ON THAT. IN FACT, I THINK HE EARNED A PERFORMANCE I.Q. OF 132 – I DON'T THINK THERE ARE MANY PEOPLE IN THIS ROOM WHO COULD EARN THAT HIGH A SCORE – FULL-SCALE I.Q. SCORE OF 121, WHICH WAS – WAS QUITE HIGH.

I GAVE HIM THE WIDE RANGE ACHIEVEMENT TEST, REVISED, WHICH WAS A TEST OF ACADEMIC FUNCTIONING. HE DOES QUITE WELL. AND HE'S QUITE LITERATE IN READING AND SPELLING, NOT REAL GOOD IN ARITHMETIC.

I ADMINISTERED THE RORSCHACH INKBLOTS, WHICH ARE THE INKBLOTS THAT WE HAND TO A PERSON AND – YOU'VE SEEN THEM ON T.V., THAT SORT OF THING. ASKED HIM TO TELL ME WHAT THEY LOOK LIKE AND WATCHED AS HE WENT ABOUT THE TASK OF SAYING WHAT THE INKBLOTS LOOKED LIKE.

I USED THE BENDER MOTOR GESTALT TEST, WHICH ARE SOME – SOME DRAWINGS THAT A

PERSON'S GIVEN, A SET OF DRAWINGS, AND ASKED TO COPY THEM ON A SHEET OF PAPER. IN FACT, IS GIVEN SEVERAL DIFFERENT OPTIONS OF HOW TO COPY THEM AND THE WAY TO GO ABOUT COPYING. AND THE WAY THEY ACT AS THEY'RE COMPLETING THIS TASK IS IMPORTANT. HAD HIM JUST DRAW SOME THINGS LIKE HOUSES, TREES, PERSONS, THESE KINDS OF DRAWINGS. LOOKED AT THOSE.

I ADMINISTERED A COMPETENCY-TO-STAND-TRIAL QUESTION-[804]NAIRE, WHICH JUST MADE SURE THAT HE WAS COMPETENT, THAT HE COULD COME INTO THE COURTROOM, UNDERSTAND WHAT WAS HAPPENING IN THE COURTROOM, RECOGNIZE THE ATTORNEY-CLIENT RELATIONSHIP AND DEAL WITH THAT, AND HAVE A RATIONAL AND FACTUAL UNDERSTANDING OF THE PROCEEDINGS IN COURT.

I ADMINISTERED THE HAPTIC VISUAL DISCRIMINATION TEST. THIS IS GOING EVEN DEEPER. THE HAPTIC IS A VERY INTERESTING TEST THAT MEASURES HOW WELL THINGS ARE ACTUALLY FUNCTIONING IN THE CENTRAL NERVOUS SYSTEM. THE INDIVIDUAL HAS A SCREEN, AND THEY PUT THEIR HAND THROUGH A SCREEN, AND THE EXAMINER HANDS THEM OBJECTS IN THEIR HAND. AND THEY DO THIS WITH BOTH HANDS, AND THEY FEEL THE OBJECT. AND THE OBJECTS ARE DIFFERENT SHAPES AND SIZES AND TEXTURES AND CONFIGURATIONS. ONE OF THEM'S THE SHAPE OF A STAR; ONE OF THEM'S A CIRCLE, A TRIANGLE. THERE'S TERRY-CLOTH AND SAIL CLOTH AND BURLAP AND ALL OF THESE DIFFERENT SHAPES OR ALL OF THESE DIFFERENT TEXTURES. THERE ARE DIFFERENT SIZES. THERE'S NUTS AND BOLTS

OF DIFFERENT SIZES. THEN THEY'RE SHOWN PICTURES OF THE OBJECT AND ASKED TO IDENTIFY THE OBJECT THAT'S IN THEIR HAND. AND INABILITIES TO DO THIS CAN REFLECT DAMAGES, DYSFUNCTIONS, AT LEAST, IN THE CENTRAL NERVOUS SYSTEM. WE USE THIS KIND OF TEST TO EXAMINE FOR DEFICITS IN THE CENTRAL NERVOUS SYSTEM, BECAUSE IF WE KNOW THE HANDS ARE WORKING OKAY, IF WE KNOW THE SENSORY RECEPTORS ARE WORKING [805] OKAY, AND IF WE KNOW THE EYES ARE WORKING OKAY, THEN IF THERE ARE DIFFERENCES IN THEIR ABILITIES TO DO THESE KIND OF TASKS – LET'S SAY, IDENTIFY SHAPES OR IDENTIFY TEX-TEXTURES OR IDENTIFY SIZES – IF THERE ARE VERY BIG DIFFERENCES, WE CAN SAY, "WELL, SOMETHING'S WRONG IN THE CENTRAL NERVOUS SYSTEM. SOMETHING'S NOT WORKING." MAYBE IT'S BROKEN. MAYBE IT'S DAMAGED. DON'T KNOW ON THAT UNTIL WE HAVE – A LOT OF TIMES WE DON'T KNOW UNTIL THE INDIVIDUAL IS IN AN AUTOPSY SITUATION BECAUSE THOSE ARE THINGS WE CAN'T SEE WITH X-RAY MACHINES. SO WE'RE LOOKING FOR CENTRAL NERVOUS SYSTEM DAMAGE.

ANOTHER TEST I GAVE, ALSO LOOKING FOR CENTRAL NERVOUS SYSTEM PROBLEMS, WAS THE NUCAREN ASSESSMENT OF NEUROMUSCULAR DEVELOPMENT. THIS IS A TEST THAT INVOLVES TASKS LIKE STANDING ON ONE FOOT, STANDING BROAD JUMP, WALKING ALONG A STRAIGHT LINE, HAND STRENGTH. WE USE A HAND DYNAMOMETER TO MEASURE STRENGTH FROM ONE HAND TO THE OTHER. IS ONE HAND STRONGER OR WEAKER

THAN THE OTHER, OR ARE THEY BOTH THE SAME? CAN A PERSON EFFECTIVELY BALANCE THEMSELVES? THESE KINDS OF TASKS CAN GIVE US A LOT OF INFORMATION, AGAIN, AS TO WHAT'S HAPPENING IN THE CENTRAL NERVOUS SYSTEM, AS TO WHETHER SOMETHING COULD BE WRONG IN THE CENTRAL NERVOUS SYSTEM. I'M TALKING ABOUT THE PART RIGHT INSIDE HERE [INDICATING]. NOW, THE CENTRAL NERVOUS SYSTEM IS THE BRAIN.

[806] Q WHEN WAS THE LAST TIME YOU SAW TED?

A I SAW TED LAST ON MAY THE 17TH OF THIS MONTH.

Q WHY DID YOU SEE HIM ON THAT PARTICULAR DAY, SIR?

A ON THAT DAY I SAW HIM BECAUSE HE ATTEMPTED TO KILL HIMSELF. HE HAD ATTEMPTED SUICIDE. I CAME TO MAKE SURE THAT HE WAS STILL CAPABLE OF COMING IN AND UNDERSTANDING WHAT WAS GOING ON. I – I OBTAINED A CERVICAL COLLAR FOR HIM ON THAT DAY TO HIDE THE BANDAGES THAT WERE ON HIS THROAT AND NECK.

Q WHAT WAS HIS EMOTIONAL STATE ON THAT DAY?

A HE WAS VERY DISTRESSED, VERY DISTRAUGHT. HE SAID, "LET'S GO AHEAD AND GET IT OVER WITH NOW."

Q DO YOU HAVE AN OPINION AS TO – OR AN ESTIMATE AS TO HOW SERIOUS THE ATTEMPT WAS TO COMMIT SUICIDE?

A I DIDN'T SEE THE ACTUAL WOUND, AND I'M NOT A PHYSICIAN; SO I'M NOT QUALIFIED TO SAY HOW DEEP IT WAS OR WHAT VEINS IT CAME CLOSE TO. I DO UNDERSTAND THERE WAS A GREAT DEAL OF BLOOD ON HIS BED, AROUND THE AREA IN THE JAIL WHERE HE ATTEMPTED SUICIDE. BUT I – I DON'T KNOW HOW SERIOUS THE WOUND WAS BECAUSE THAT'S OUTSIDE MY FIELD.

Q WELL, WHAT DO YOU KNOW ABOUT TED'S BACKGROUND, DR. WRIGHT?

A I KNOW IT WAS A VERY DIFFICULT BACKGROUND. I KNOW TED HAS – THERE ARE A LOT OF GAPS IN THAT BACKGROUND.

APPARENTLY, HE'S HAD A VERY RUGGED, ROUGH CHILDHOOD. HE DOESN'T REMEMBER – HE SIMPLY DOESN'T HAVE ACCESS TO A LOT [807] OF MEMORIES ABOUT HIS CHILDHOOD AND HIS EARLY LIFE, AND THAT TELLS US A LOT MORE ABOUT THE PAIN OF HIS EARLIER LIFE, ABOUT THE PAIN HE PERHAPS EXPERIENCES NOW, THAN IF WE HAD A WHOLE DETAILED BIOGRAPHY OF TED. IT TELLS US HOW IT EFFECTS HIM TODAY.

Q WELL, WHAT EFFECT DOES – DOES THIS HAVE ON HIS PRESENT LIFE TODAY?

A I THINK HIS PERSONALITY IS VERY FRAGMENTED. I THINK – I DON'T THINK TED KNOWS TED VERY WELL AT ALL.

Q OKAY.

A I THINK THERE'S A GREAT DEAL OF TED THAT'S NOT – OF HIS – OF HIS LIFE, OF HIS REASONS, OF HIS MOTIVES, THAT ARE NOT ACCESSIBLE TO HIM, THAT HE SIMPLY DOESN'T RECOGNIZE.

Q WHAT – HOW IS HIS BACKGROUND GOING TO AFFECT HIS FUTURE?

A OBVIOUSLY, IT'S NOT A GOOD INDICATOR. ANY OF US THAT HAVE A BAD, VERY PAINFUL BACKGROUND HAVE LESS CHANCE OF A FUTURE. I THINK IN THE CASE OF TED – AND I THINK THE RESEARCH CERTAINLY INDICATES THAT INDIVIDUALS LIKE TED, INDIVIDUALS WHO HAVE HAD THIS KIND OF BACKGROUND, TEND TO BEGIN TO MAKE CHANGES AT ABOUT FORTY, FORTY-FIVE, FIFTY, SOMEWHERE IN THERE. THEY TEND TO MELLOW A BIT AND CHANGE A GOOD BIT. YOU CAN INFER THAT FROM SOME OF THE F.B.I. CRIME STATISTICS ON AGE AND CHANGES IN PERSONS.

YOU CAN GET THAT DIRECTLY – I THINK IT WAS "LYONS CHARACTER DISORDERS" BOOK IN 1982, AND I'M NOT SURE OF THE [808] PUBLISHER. WILLIAMS AND WILKINS, I THINK, BUT I'M NOT SURE OF THAT PUBLISHER. THAT BRINGS TOGETHER A LOT OF RESEARCH THAT'S BEEN DONE TO SHOW THAT THESE INDIVIDUALS MAKE A GREAT DEAL OF CHANGE AS THEY GET OLDER AND AS THEY MELLOW.

Q OKAY. I THINK YOU WERE CALLING THAT "BURNOUT" AT ONE TIME.

A "BURNOUT." THAT'S A GOOD WORD, "BURNOUT." INDIVIDUALS – THE FACTORS THAT ARE THERE THAT CAUSE MALADAPTIVE, MALADJUSTIVE BEHAVIORS TEND TO CHANGE. THE COMPASS GETS – YOUR COMPASS IS POINTED A DIFFERENT DIRECTION WHEN YOU'RE FORTY-FIVE THAN IT IS WHEN YOU'RE TWENTY-FIVE OR THIRTY-FIVE.

Q IS TED THE TYPE OF PERSON THAT – IF HE WAS WORKING AND SOMEBODY CAME ALONG AND ASKED HIM TO GO OR DO SOMETHING ELSE, WHAT WOULD HE DO?

A WELL, TED'S – TED LACKS A GREAT DEAL OF IMPULSE CONTROL. AND I THINK THAT'S IMPORTANT IN THESE TESTS I GAVE, THE ONE WHERE YOU PUT YOUR HAND THROUGH THE SCREEN AND THE TEST OF – OF THE BALANCE AND THIS SORT OF THING. IT INDICATES SOME CENTRAL NERVOUS DAMAGE OR VERY LIKELY CENTRAL NERVOUS DAMAGE. COMBINE THAT AND ALL THE OTHER FACTORS OF TED'S BACKGROUND, ALL THESE OTHER THINGS, WE'RE GOING TO HAVE AN INDIVIDUAL WITH SOME REAL PROBLEMS WITH IMPULSE CONTROL. IMPULSE IS SOMETHING HE – HE WANTS TO [809] DO. HE'S GOING TO TAKE THE SHORT BRIDGE INSTEAD OF THE LONG BRIDGE.

Q WHAT DO YOU MEAN BY THAT, NOW?

A THE SHORT BRIDGE IS THE DISTANCE TO AN IMMEDIATE GRATIFICATION, TO SOMETHING THAT'S GOING TO BE GOOD. "NOW, I'LL GO WITH THIS PERSON. I'LL DROP MY JOB, AND I'LL GO SOMEWHERE. I'LL DO SOMETHING THAT MAKES LIFE MORE EXCITING RIGHT NOW."

IT'S KIND OF LIKE, ON A DIFFERENT SCALE, "I'LL HAVE ANOTHER CIGARETTE RATHER THAN QUIT SMOKING FOR GOOD HEALTH FOR A LONG TIME." PEOPLE SOMETIMES WILL TAKE THE SHORT BRIDGE.

I THINK IN MOST OF TED'S LIFE HE'S GOING TO TAKE THE SHORT BRIDGE RATHER THAN THE LONG BRIDGE. "THE LONG BRIDGE" MEANS "IF I CONTINUE TO WORK, IF I STAY IN THIS JOB, IF I ESTABLISH SOME FRIENDSHIPS, THEN I CAN HAVE A LOT HAPPIER LIFE." BUT HE'S GOING TO TAKE THE SHORT BRIDGE, THE IMMEDIATE GRATIFICATION, RATHER THAN THE LONG BRIDGE. AND I THINK HIS HISTORY, I THINK THE PAIN IN HIS LIFE, I THINK THE LIKELINESS OF SOME NEUROLOGICAL DYSFUNCTION IN THE CENTRAL NERVOUS SYSTEM – I THINK ALL OF THIS PLAYS TOGETHER TO MAKE IT TO WHERE HE VERY OFTEN CAN'T BEHAVE IN ANOTHER WAY.

Q NOW, HAVE YOU SEEN THE DIARY THAT HE KEPT FROM AUGUST THE 31ST THROUGH THE 12TH OF DECEMBER?

[810] A I'VE SEEN THAT DIARY. I'VE NOT READ MUCH OF IT.

Q THERE'S A STATEMENT IN THERE TO THE EFFECT THAT HE WOULD LIKE TO GO TO THE CARIBBEAN OR THE MEDITERRANEAN AND SOMEWHERE IN THE SOUTH AND THE JUNGLES . . . SMUGGLE, STEAL, ROB, RAPE, PILLAGE, BE A MODERN-DAY VIKING OR PIRATE.

WHAT DOES THAT INDICATE TO YOU?

A WELL, I THINK – I THINK ONE THING I FOUND OUT ABOUT TED IS HE LIVES A LOT OF HIS LIFE IN FANTASY, A GREAT DEAL OF HIS LIFE IN FANTASY. I GAVE HIM THE INKBLOT TEST. AND THE INKBLOT TEST IS INTERESTING BECAUSE YOU HAND A PERSON A SILLY THING LIKE AN INKBLOT. YOU COULD TAKE THEM OUT TO LOOK AT CLOUDS, BUT CLOUDS DON'T STAY STILL, AND YOU CAN'T ALWAYS BE GUARANTEED THAT YOU'VE GOT CLOUDS; SO WE USE AN INKBLOT. WE HAND THEM AN INKBLOT. IT'S AN INKBLOT THAT'S BEEN USED SINCE 1921; SO WE KNOW KIND OF HOW PEOPLE ARE GOING TO REACT WHEN THEY LOOK AT THESE TEN DIFFERENT INKBLOTS.

TED'S APPROACH TO THE TEST SUGGESTED HE USES A TREMENDOUS AMOUNT OF FANTASY, MEETS HIS NEEDS THROUGH FANTASY. THERE'S A LOT OF FANTASY IN HIS – IN HIS LIFE. HE'S BEEN IN PRISON A GOOD BIT OF HIS LIFE AND PROBABLY SURVIVED BY RESORTING TO USING FANTASY RATHER THAN TO DEAL WITH THE REALITY. IT'S NOT THAT HE DOESN'T RECOGNIZE HIS FANTASY, BUT THIS IS HIS WAY OF PASSING THE TIME. AND I THINK THAT COULD HAVE SOMETHING TO DO WITH – WITH HIS [811] STATEMENTS, VERY DEFINITELY.

Q WELL, DO YOU THINK THAT COULD HAVE SOMETHING TO DO WITH BEING INSTITUTIONALIZED SINCE HE WAS SIXTEEN?

A SURE. SURE. HE'S HAD TO FIND SOME WAY TO SURVIVE. HE'S BEEN INSTITUTIONALIZED. HE'S HAD TO FIND A WAY TO FIND SOME INTEREST IN

LIFE. IT'S NOT VERY INTERESTING, APPARENTLY, SITTING IN A CELL ALL DAY.

Q DOES THE – WHAT YOU JUST DESCRIBED ABOUT THE STATEMENT THAT I GAVE YOU, THE MODERN-DAY VIKING, PIRATE, IS THAT ANY INDICATION OF WHAT THE FUTURE WOULD HOLD IN MR. COLE'S CASE?

A OH, MAYBE FUTURE FANTASIES.

Q BUT AS TO ACTUALLY FULFILLING THAT FANTASY?

A I DON'T THINK HE'D HAVE THE WHEREWITHAL TO FULFILL THAT KIND OF FANTASY, NO. I THINK THAT'S – THAT'S A FANTASY.

Q WELL, IT SOUNDS LIKE YOU KNOW TED PRETTY WELL, PROBABLY BETTER THAN TED HIMSELF.

A I THINK I KNOW TED VERY WELL. I SPENT A GREAT DEAL OF TIME WITH HIM, EIGHT HOURS OF INDIVIDUAL CONVERSATION, A LOT OF TESTING, A LOT OF VISITS AT DIFFERENT TIMES OF THE DAY. I WENT TO VISIT HIM IN THE MORNING TO SEE HOW HE IS WHEN HE GETS UP, TO SEE IF THIS IS CONSISTENT WITH SOME CHARACTERISTICS OF INDIVIDUALS WITH NEUROLOGICAL PROBLEMS. AND INDEED, HE'S – HE'S QUITE IRRITABLE WHEN HE WAKES UP IN THE MORNING. I WENT TO VISIT HIM LATER IN THE EVENING [812] TO SEE HOW HE IS AFTER HE'S BEEN UP AWHILE; GET IDEAS OF HOW HE IS FROM WEEK TO WEEK, WHAT KIND OF CONSISTENCY IS IN HIS PERSONALITY. WE'D TALK A GOOD BIT OF TIME EACH OF THESE VISITS, AND

THEN WE'D DO SOME TESTS, AND THEN WE'D TALK, AND THEN WE'D DO SOME TESTS.

SO I THINK IF WE CONSIDER HOW LITTLE TED KNOWS ABOUT HISSELF, I THINK YOU'RE RIGHT. I DO KNOW TED BETTER THAN HE KNOWS HIMSELF, BECAUSE HE'S NOT ACCESSIBLE TO HIMSELF. MUCH OF HIS PAST – MUCH OF HIS LIFE HE DOESN'T HAVE AS – THAT'S BEEN – IT'S BEEN SO PAINFUL THAT HE'S SUPPRESSED IT. IT'S NOT THERE.

Q HOW WOULD YOU SUM HIM UP TODAY?

A CONSIDERING HIS – HE'S BRIGHT, VERY BRIGHT, SIZZLING BRIGHT. HE'S EXTREMELY DEPRESSED TODAY. I THINK THE DEPRESSION HAS PROBABLY BEEN THERE A LONG TIME IN HIS LIFE. I THINK THAT THE RAW MATERIAL THAT HE STARTED WITH IS FANTASTIC RAW MATERIAL. JUST THE – AN ORDINARY FAMILY WOULD BE DELIGHTED TO HAVE A BABY COME INTO THE FAMILY WITH HIS KIND OF RAW MATERIAL. AND I'M GOING TO USE MY ANALOGY A BIT FURTHER OF RAW MATERIAL. THE MANUFACTURING PROCESS IS BOTCHED THE RAW MATERIAL HORRIBLY. IT'S GOOD RAW MATERIAL, BUT IT'S BEEN VERY DAMAGED.

Q WHAT IS YOUR OPINION AS TO FUTURE DANGEROUSNESS SIX, TEN, TWELVE, TWENTY YEARS FROM NOW?

A I THINK IF TED WERE RELEASED TODAY ON THE STREET, THERE'S [813] A MUCH GREATER PROBABILITY OF DANGEROUS BEHAVIOR THAN WITH THE REST OF US. WE CAN ONLY TALK IN PROBABILITIES. WE CAN'T TALK IN CERTAINTIES BECAUSE WE DON'T HAVE CRYSTAL BALLS. BUT I THINK THERE'S A PROBABILITY THAT ALL OF US ARE LIKELY TO ENGAGE IN DANGEROUS BEHAVIOR OR IN VIOLENT BEHAVIOR. IT'S NOT GOING TO BE THE SAME FOR ALL OF US. I THINK FOR TED IT'S GOING TO BE MUCH GREATER THAN FOR MOST INDIVIDUALS RIGHT NOW. SO I THINK THERE'S A POSSIBILITY OF FUTURE VIOLENCE. I DON'T THINK THERE'S ANY WAY WE – I THINK WE'D BE FOOLISH TO SAY OTHERWISE. I THINK WE'RE LOOKING AT YEARS FROM NOW.

THE RESEARCH ON INDIVIDUALS WHO BEHAVE THIS WAY – AND I CITED THOSE TWO EXAMPLES I'M FAMILIAR WITH, THE SPECIFIC STUDIES THAT HAVE BEEN DONE, BECAUSE THEY'RE ALL PRETTY MUCH SUMMARIZED AND ANALYZED IN THOSE STUDIES THAT I CITED. BUT I THINK AS WE SEE HIM AGE, GET OLDER, HORMONES CHANGE, THE PROCESS OF AGING TAKES OVER, AS IT DOES IN ALL OF US – AND WE ALL CHANGE. I THINK THE EVIDENCE IS OVERWHELMING THERE THAT INDIVIDUALS WHO HAVE BEHAVED AS HE HAS CHANGE. THEY BURN OUT. AND I THINK THERE'S A GOOD CHANCE OF LATER IN LIFE – NOT NOW, BUT LATER IN LIFE – SOME CHANGES.

Q ALL RIGHT. IS – KNOWING THAT TED HAS LIVED SO MANY YEARS IN PRISON AND WHAT I CALLED "INSTITUTIONALIZED" AWHILE AGO, DOES

HE REALLY KNOW ANY OTHER ROUTINE OR LIFE OTHER [814] THAN A – JUST A STRAIGHT DISCIPLINE TYPE REGIME?

A NO, I THINK THE – I DON'T THINK HE'S HAD A CHANCE AS AN ADULT TO DEVELOP ANY OTHER KIND OF LIFE BUT A ROUTINE, DISCIPLINED, HIGHLY-STRUCTURED KIND OF LIFE.

MR. SPENCE: PASS THE WITNESS, YOUR HONOR.

THE COURT: DO YOU HAVE ANY QUESTIONS?

MR. ALCALA: APPROACH THE WITNESS, YOUR HONOR?

THE COURT: YOU MAY.

CROSS EXAMINATION

BY MR. ALCALA:

Q DR. WRIGHT, WHAT WAS THE NAME OF THE TEST THAT YOU USED WHERE HE TOUCHED AN OBJECT AND YOU GAUGED HIS FEELINGS ABOUT IT? WHAT WAS THE NAME OF THAT AGAIN?

A THIS IS THE HAPTIC VISUAL DISCRIMINATION TEST, WHERE HE TOUCHES AN OBJECT AND YOU SEE WHETHER HE CAN RECOGNIZE THAT OBJECT.

Q DID YOU GIVE HIM ANY OBJECT TO TOUCH THAT IS SIMILAR TO THE FIBER SUCH AS I PLACE BEFORE YOU, STATE'S EXHIBIT NUMBER 21?

A SURE. THE FIBER IN THIS? NOT IDENTICAL, BUT THERE WERE SOME OBJECTS THAT WERE USED, SAIL CLOTH, TERRY-CLOTH, THESE KINDS OF THINGS.

Q WHAT DID HE RESPOND WHEN YOU HAD HIM TOUCH THOSE – THAT [815] TYPE OF FABRIC?

A I CAN GET THE TEST AND TELL YOU IN A SECOND. LET'S SEE ... TOUCHING DIFFERENT FABRICS – ACTUALLY, THIS IS A SPOOL WITH FABRIC TAPED ON THE OUTSIDE. THE INDIVIDUAL HOLDS THEIR HAND THROUGH A SCREEN, AS I SAID. THEY CAN'T SEE IT. AND THEY FEEL THE FABRIC, AND THEN THEY POINT TO A PICTURE OR TELL YOU THE NUMBER BENEATH THE PICTURE OF FIVE DIFFERENT ITEMS –

THE COURT: EXCUSE ME –

THE WITNESS: – WHICH ONE OF THESE IT IS.

THE COURT: – JUST A SECOND. EXCUSE ME.

MR. BAILIFF, IF THEY'RE MOWING THE LAWN OUT THERE, YOU CAN TELL THEM THEY CAN COME BACK LATER. WHATEVER THAT IS, TELL THEM TO TURN IT OFF.

THE WITNESS: THERE ARE FIVE DIFFERENT ITEMS. AND ON THAT, HE DIDN'T DO WELL AT ALL. IN FACT –

BY MR. ALCALA:

Q WHAT DO YOU MEAN, "HE DIDN'T DO WELL AT ALL"?

A WELL, HIS SCORE WITH HIS LEFT HAND WAS A – A STANDARD SCORE OF SIX. AVERAGE IS TEN. PROBABLY NINETY TO NINETY-FIVE PERCENT OF THE POPULATION DOES BETTER. ON HIS RIGHT HAND IT WAS AN EIGHT, AND THE AVERAGE IS TEN. PROBABLY SEVENTY PERCENT OF THE POPULATION DOES BETTER. [816] THE POPULATION I'M TALKING ABOUT IS THE GENERAL PERSON ON THE STREET WHO TAKES THE SAME TEST – CAN USUALLY DO BETTER TOUCHING THESE ITEMS AND IDENTIFYING CORRECTLY WHICH IS THE ITEM THEY'VE GOT IN THEIR HAND.

Q AND THOSE SCORES ARE DETERMINED BY WHAT HE TELLS YOU ABOUT WHAT HE TOUCHES; IS THAT CORRECT?

A IT'S BY – DETERMINED BY WHETHER HE CAN CORRECTLY IDENTIFY THE OBJECT, THE PICTURE OF THE OBJECT THAT HE'S TOUCHING.

Q OH, OKAY. NOW, ARE YOU – YOU'RE NOT A MEDICAL DOCTOR; IS THAT CORRECT?

A I'M NOT. I'M A PSYCHOLOGIST.

Q DOES THE CENTRAL NERVOUS SYSTEM HAVE SOMETHING TO DO WITH MATTERS RELATED TO PHYSIOLOGICAL MATTERS?

A IT DOES. WE'RE TALKING ABOUT CENTRAL NERVOUS SYSTEM DYSFUNCTION. I DON'T KNOW

WHETHER THERE'S DAMAGE OR NOT. LIKE I SAY, THAT MAY HAVE TO BE DETERMINED IN CASES ON A – THE ONLY WAY WE CAN DETERMINE THAT SOMETIMES IS A POST-MORTEM EXAMINATION, WHETHER THERE'S DAMAGE, BECAUSE IT DOESN'T SHOW UP IN PICTURES AND THAT SORT OF THING; AND IT'S INSIDE THE HEAD AND REAL HARD TO LOOK AT. "DYSFUNCTION" IS ALL WE CAN TALK ABOUT. IT'S NOT WORKING.

Q NOW, HAVE YOU EVER KNOWN OF PEOPLE WHO ARE PEDOPHILES OR PEOPLE WHO LIKE TO HAVE SEX – SEXUAL ENCOUNTERS WITH CHILDREN? WOULD THAT BE CORRECT, PEDOPHILES; THEY LIKE TO HAVE –

[817] A PEDOPHILES ARE THE –

Q – SEXUAL ENCOUNTERS WITH CHILDREN?

A – ONES WITH CHILDREN, YES.

Q ALL RIGHT. HAVE YOU EVER SEEN THEM IN – WHEN THEY'RE ABOVE THE AGE OF FORTY, IN THEIR FIFTIES?

A YES.

Q SO IT'S POSSIBLE, ISN'T THAT CORRECT, THAT THEIR HORMONES WOULDN'T CHANGE AS YOU SUGGESTED EARLIER?

A I'M NOT SUGGESTING HORMONES CHANGE. I'M SUGGESTING THAT, AS WE GROW OLDER, WE CHANGE; THE COMPASS POINTS A DIFFERENT DIRECTION. WE'RE TIRED. WE'RE – WE'RE – OUR GOALS, OUR ORIENTATION IS DIFFERENT. THE

RESEARCH INDICATES THAT – THAT THIS IS THE CASE WITH INDIVIDUALS WHO COMMIT VIOLENT OR ANTISOCIAL ACTS.

Q ARE YOU SAYING THAT – SIR, THAT THE GENERAL PUBLIC, PEOPLE, JUST ANY CITIZEN, DO NOT EVER IN THEIR LIFE EXPERIENCE PAINS WHEN THEY'RE GROWING UP?

A EVERY ONE OF US DO.

Q AND ISN'T IT TRUE THAT DIFFERENT OF US REACT DIFFERENTLY AND DEAL WITH OUR PAINS DIFFERENTLY? ISN'T THAT CORRECT?

A THAT'S RIGHT.

Q AND IN THIS CASE, THIS INDIVIDUAL DEALT WITH PAIN BY KILLING ONE PERSON WHEN HE WAS SIXTEEN AND THEN ANOTHER PERSON WHEN HE WAS THIRTY. IS THAT THE WAY HE DEALT WITH PAIN?

[818] A. I'M NOT SURE WHY THOSE THINGS HAPPENED.

Q OKAY. ISN'T THAT A FACT THAT HE DID THAT, SIR?

A AS I UNDERSTAND. I DIDN'T SEE THAT HAPPEN; BUT AS I UNDERSTAND, THOSE WERE DETERMINED THROUGH DUE PROCESS; AND SO, THEN, THEY'RE FACTS.

Q ARE YOU FAMILIAR WITH HIS BACKGROUND? HAVE YOU BEEN ADVISED OF HIS BACKGROUND, THAT HE'S BEEN CONVICTED OF MURDER WHEN HE WAS SIXTEEN?

A I'VE BEEN ADVISED OF THAT, YES.

Q HAVE YOU BEEN ADVISED THAT HE WAS CONVICTED OF AGGRAVATED SEXUAL ABUSE IN DALLAS COUNTY, TEXAS?

A I HAVE.

Q OKAY. WELL, WAS – DO YOU THINK HE WAS DEALING WITH HIS PAIN WHEN HE COMMITTED THAT AGGRAVATED SEXUAL ABUSE ON THOSE CHILDREN BACK IN 1981, '82?

A WHETHER HE WAS DEALING WITH HIS PAIN, WHAT HE WAS DEALING WITH, I'M NOT SURE.

Q OKAY. NOW, DID I – DID I HEAR YOU CORRECT TO SAY THAT ALL OF US COMMIT DANGEROUS ACTS?

A NO. I SAID, ALL OF US – THERE IS A – ALL OF US – THERE'S A POSSIBILITY THAT ANY OF US IN THE RIGHT CIRCUMSTANCES COULD DO SOMETHING DANGEROUS OR ANTISOCIAL OR VIOLENT.

Q GIVEN THE DEFENDANT'S BACKGROUND, DO YOU THINK IT'S MORE PROBABLE THAT HE WOULD COMMIT THOSE ACTS?

[819] A. ABSOLUTELY.

Q YOU HAVE NO PROBLEM WITH THAT, DO YOU?

A NO, NO PROBLEM WITH THAT.

Q OKAY. DO YOU – KNOWING HIM AS YOU SAY YOU DO – AND YOU TESTIFIED YOU KNOW HIM PROBABLY BETTER THAN HE KNOWS HIMSELF –

A I THINK SO.

Q – DO YOU FEEL HE'S A DANGEROUS PERSON?

A YES.

Q OKAY. AND ISN'T IT A FACT THAT THERE'S A PROBABILITY THAT HE WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY IN THE FUTURE? ISN'T THAT CORRECT?

A I THINK THAT PROBABILITY IS STRONGER THAN FOR THE REST OF US, YES.

Q YOU SAID HE FINDS INTERESTS – FINDS HIS INTEREST IN LIFE THROUGH THESE FANTASIES. DO YOU THINK HE WAS ENGAGED IN A FANTASY WHEN HE WAS COMMITTING THE MURDER OF MR. RAYMOND C. RICHARDSON?

A WELL, THAT WAS APPARENTLY REALITY.

Q OKAY. AT WHAT POINT DOES HE GO – GET INTO FANTASY AND AT WHAT POINT DOES HE GET INTO REALITY?

A OH, I DON'T – I DON'T THINK IT'S A PROBLEM OF BEING UNABLE TO DISTINGUISH FANTASY FROM REALITY. I THINK THAT'S IMPORTANT THAT IT BE CLEAR. I THINK HE MEETS MANY [820] OF HIS NEEDS THROUGH FANTASY. AND I THINK THAT WRITING IN HIS DIARY ABOUT BEING A PIRATE AND ALL THESE KINDS OF THINGS – I THINK THAT'S A FANTASY OF HIS. I DON'T THINK THAT'S A –

Q HE'S – HE –

A – REALITY.

Q HE'S AN INTELLIGENT PERSON; IS THAT CORRECT?

A VERY INTELLIGENT.

Q OKAY. AND HE'S THIRTY YEARS OLD; IS THAT CORRECT?

A THAT'S CORRECT. NO, I THINK HE'S – HIS DATE OF BIRTH IS JULY 27, 1956. I BELIEVE THAT MAKES HIM THIRTY-ONE.

Q OKAY. NOW, IN VIEW – IF YOU KNOW HIS BACKGROUND, THAT HE HAS BEEN CONVICTED OF MURDER BEFORE, HE'S BEEN CONVICTED OF AGGRAVATED SEXUAL ABUSE, AND NOW KNOW THAT HE'S BEEN CONVICTED OF CAPITAL MURDER IN THIS PARTICULAR CASE, AND YOU READ IN HIS DIARY THAT HE WANTS TO GO OUT AND RAPE, PILLAGE AND MURDER, DOES THAT PARTICULAR SENTENCE THERE IN THAT PASSAGE IN THE DIARY GIVE YOU – ARE YOU STILL SAYING THAT HE'S LIVING IN A FANTASY?

A I THINK HE'S WRITING IN A FANTASY WHEN HE WRITES THAT.

Q OKAY. BUT INDEED HE'S LIVED THOSE THINGS, HAS HE NOT?

A HE'S NEVER BEEN A PIRATE.

Q OKAY.

A HE'S –

Q IN THE SENSE OF A PIRATE BEING SOMEONE WHO TAKES THAT [821] WHICH IS NOT HIS, EITHER LIFE OR PROPERTY –

A INDEED HE HAS.

Q – INDEED HE HAS LIVED THAT, HAS HE NOT?

A THAT'S BEEN DETERMINED BY DUE PROCESS, YES.

Q OKAY. HOW DID YOU COME UP WITH THE AGE OF A PERSON CHANGING BEING AT THE AGE OF FORTY-FIVE AND, IN PARTICULAR, THIS DEFENDANT?

A PARDON? YOUR LAST QUESTION . . . ?

Q IN PARTICULAR THIS DEFENDANT?

A THOSE STATISTICS, I'M NOT – I'M NOT CERTAIN OF THE F.B.I.'S SOURCE OF THOSE STATISTICS. IT'S – I CAN CITE IT. IT'S THE . . . SOMEWHERE HERE I'VE GOT THAT. THE – IT'S REFLECTED IN THE F.B.I. CRIME STATISTICS. I'VE SEEN THOSE STATISTICS, BUT I CAN'T QUOTE YOU EXACTLY THE SOURCE.

QUOTING MAINLY LYONS' BOOK, "CHARACTER DISORDERS," 1982. THAT'S MY MAIN SOURCE FOR SAYING THAT THE RESEARCH OVERWHELMINGLY INDICATES THAT THIS HAPPENS TO INDIVIDUALS WHO HAVE BEHAVED IN THIS WAY.

WE'RE TALKING AGAIN IN PROBABILITIES. TED HAS A GREATER PROBABILITY THAN THE REST OF

US OF DOING SOMETHING VIOLENT IF HE'S TURNED LOOSE RIGHT NOW.

Q OKAY.

A WE ALSO KNOW FROM PROBABILITIES THAT, AS PEOPLE GROW OLDER, THE PROBABILITY OF THEM BECOMING INVOLVED IN [822] VIOLENT ACTS DECREASES TO THE POINT OF FIFTY, WHERE THE F.B.I. STATISTICS WOULD INDICATE THAT THEY'RE ALMOST – IT ALMOST DOESN'T HAPPEN. THESE BEHAVIORS HAVE ALMOST BURNED OUT OF INDIVIDUALS. WHILE THEY MAY BE FLAMING WHILE THEY'RE YOUNGER, THEY BURN OUT LATER. SO I DON'T HAVE ANY SPECIFIC STATEMENTS FOR TED AS AN INDIVIDUAL. THAT WOULD TAKE A CRYSTAL BALL. BUT FOR TED AS A – AS A HUMAN BEING, WE KNOW THIS HAPPENS TO HUMAN BEINGS WHO ARE LIKE TED, WHO HAVE HISTORIES LIKE TED. WE KNOW FROM STATISTICS THAT THEY CHANGE, AS WE DO ALL CHANGE.

Q OKAY. BUT THESE ARE – THESE MATTERS ARE JUST BASED ON STATISTICS AND POSSIBILITIES; IS THAT CORRECT?

A IT'S THE SAME WAY THAT WE'RE PREDICTING OR THAT WE'RE SAYING THE PROBABILITY OR POSSIBILITY OF FUTURE DANGEROUSNESS. IT'S BASED ON STATISTICS.

Q BASED ON – BASED ON A – ON PRIOR EXPERIENCE, YOU CAN –

A PRIOR EXPERIENCE.

Q – PRETTY MUCH TELL WHAT'S GOING TO HAPPEN; IS THAT CORRECT?

A ONE OF THE BEST PREDICTORS OF FUTURE BEHAVIOR IS PAST BEHAVIOR. ANOTHER GREAT PREDICTOR OF FUTURE BEHAVIOR IS THE BEHAVIOR THAT WE FIND IN NOMOTHETIC, OR NORMS, OR IN – THAT'S A BIG WORD TO MEAN IT TAKES A WHOLE – WHOLE PART OF SOCIETY AND SEES WHAT HAPPENS TO INDIVIDUALS LIKE THIS AS THEY GROW OLDER.

[823] Q. AND IT'S VERY PROBABLE THAT IF A PERSON HAS COMMITTED TWO MURDERS AND SEXUALLY ABUSED CHILDREN, THAT HE'S GOING TO – IT'S PROBABLE THAT HE'S GOING TO CONTINUE DOING THAT; ISN'T THAT CORRECT, SIR? THERE'S A GREATER PROBABILITY THAT HE'S GOING TO CONTINUE THAT; IS THAT CORRECT?

A HE WOULD – YES, THERE WOULD BE A GREATER PROBABILITY. NOT A VERY PROBABLE, BUT THERE WOULD BE A – THERE WOULD BE A GREATER LIKELINESS THAN WITH THOSE OF US IN THE NORMAL POPULATION.

Q WHY DO YOU SAY IT'S NOT VERY PROBABLE THAT HE WOULD CONTINUE THAT LIFESTYLE?

A I SAID – YOU SAID, "THERE'S A GREATER PROBABILITY."

Q IS THERE NOT A GREATER PROBABILITY?

A YOU SAID, "A VERY [SIC] GREATER PROBABILITY," AND I SAID THERE IS A GREATER PROBABILITY. I'M NOT SURE HOW GREAT.

Q OKAY. HE KNOWS RIGHT FROM WRONG, DOES HE NOT?

A NO DOUBT.

Q WOULD IT BE UNUSUAL FOR A PERSON THAT'S STANDING TRIAL FOR CAPITAL MURDER WOULD BE DEPRESSED?

A BE VERY UNUSUAL FOR THEM NOT TO BE DEPRESSED.

Q SO THAT WHEN YOU SAY THAT WHEN YOU SAW HIM – WHEN YOU SAW HIM TODAY, APPARENTLY WHEN YOU SAW HIM WHEN HE TRIED TO ATTEMPT SUICIDE, IF HE'D BEEN DEPRESSED, THAT'S NOT UNUSUAL, IS IT?

A IT'S UNUSUAL IN THE LENGTH OF TIME HE'S BEEN DEPRESSED. [824] I THINK HE'S BEEN DEPRESSED ALL HIS LIFE. I THINK HE'S BEEN CHRONICALLY DEPRESSED. HE HAS TERRIFIC NEEDS FOR NURTURANCE. HE'LL TAKE THE SHORT BRIDGE ANY TIME AND GO FOR NURTURANCE. IF SOMEBODY WHO'S NON-THREATENING TO HIM PROMISES THAT THEY CAN BE NURTURING TO HIM – AND BY "NURTURING," I'M TALKING ABOUT THEY CAN GIVE HIM SOME KIND OF WARMTH, SOME KIND OF ACCEPTANCE, SOME KIND OF FEELING THAT HE'S ALREADY – HE'S NEVER FELT LOVED AND WORTHWHILE IN HIS LIFE. HE'LL GRAB AT ANY SCRAP. HE'LL SCRAPE FOR FEELING LOVED AND WORTHWHILE. SO . . .

Q IF IT WERE THE TYPE OF NURTURING – IF YOU WOULD ASSUME, JUST FOR THE PURPOSE OF THE QUESTION, THAT A SIXTY-SIX-YEAR-OLD MAN

TOOK HIM IN AS A FRIEND, ALLOWED HIM IN HIS HOME, TALKED TO HIM – WOULD THAT BE THE TYPE OF NURTURING THAT HE WOULD NEED, PART OF IT?

A OH, YEAH. SURE. HE'D NEED THAT.

MR. ALCALA: I'LL PASS THE WITNESS, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. SPENCE:

Q GETTING BACK TO THE NEED TO NURTURE, DR. WRIGHT, KELLY HICKEY, WHO IS MR. COLE'S SISTER – OR HALF-SISTER-IN-LAW – IF SHE WERE TO SHOW HIM FEELINGS OF LOVE OR TREAT HIM LIKE A MAN, SHOW SOME EMOTION TOWARDS HIM, IS HE THE TYPE [825] OF PERSON THAT WOULD DROP EVERYTHING AND GO WITH HER?

A I THINK SO, PROBABLY.

Q OKAY.

A HE'S HUNGRY FOR THAT SORT OF THING.

Q OKAY. FOR SOMETHING HE'S NEVER HAD ALL HIS LIFE?

A I DON'T THINK HE HAS.

Q WHAT IS A "SOCIOPATH"?

A I DON'T KNOW. AND I – I DON'T KNOW BECAUSE IT'S NOT – THAT'S A – "SOCIOPATH" IS A – IS A COLLOQUIAL WORD. IT'S A POPULAR WORD. IT'S NOT A SCIENTIFIC WORD. SOCIOPATH – I'VE HEARD

BUSINESSMEN CALLED "SOCIOPATHS" BECAUSE THEY'RE VERY SHREWD, CAR DEALERS CALLED A "SOCIOPATH" BECAUSE MAYBE THEY PLAY THE USED CAR UP AS BEING A LITTLE BIT BETTER THAN IT IS. I DON'T – THERE'S NOT A – THAT'S NOT IN THE VOCABULARY OF MY PROFESSION. IT'S – IT'S A WORD THAT I HAVE CERTAINLY HEARD. IT'S A WORD THAT – WHEN SOMEBODY PULLS IN FRONT OF ME ON THE FREEWAY, I MIGHT SCREAM "SOCIOPATH" AT THEM FOR A – ESPECIALLY IF THERE'S SOMEONE IN THE BACK SEAT I WOULDN'T WANT TO HEAR ANOTHER KIND OF WORD, BUT I DON'T – AS FAR AS WHAT IT IS SCIENTIFICALLY, I DON'T KNOW. IT'S NOT A SCIENTIFIC WORD.

MR. SPENCE: OKAY. I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

[826] MR. ALCALA: NOTHING FURTHER, YOUR HONOR.

THE COURT: STEP DOWN.

* * *

[828] THE COURT: BE SEATED, SIR.

MR. WENDELL DICKERSON: THANK YOU.

THEREUPON,

WENDEL L. [sic] DICKERSON, Ph.D.,

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q WOULD YOU STATE YOUR NAME FOR THE RECORD, SIR?

A MY NAME IS "WENDEL L. DICKERSON."

Q OKAY: WOULD YOU TELL US SOMETHING ABOUT YOUR EDUCATIONAL BACKGROUND, SIR?

A I HAVE BACHELOR'S AND MASTER'S DEGREES FROM NORTH TEXAS STATE UP IN DENTON, AND I HOLD A DOCTORAL DEGREE FROM THE UNIVERSITY OF TEXAS IN AUSTIN.

Q SO YOU HAVE A DOCTORATE OF PSYCHOLOGY?

A YES, I DO.

Q ARE YOU THE HOLDER OF ANY CERTIFICATES OR LICENSE, SIR?

A YES. I'M LICENSED BY THE STATE BOARD OF EXAMINERS OF THE STATE OF TEXAS.

Q OKAY. WOULD YOU TELL US SOMETHING ABOUT YOUR EMPLOYMENT?

A I HAVE BEEN WORKING AS A PSYCHOLOGIST PROFESSIONALLY SINCE 1960; SO I GUESS I'M COMING UP ON TWENTY-EIGHT YEARS HERE [829] IN A FEW DAYS. I BEGAN THAT IN SOME OF THE STATE MENTAL INSTITUTIONS IN AUSTIN. BEEN ON THE FACULTY OF SEVERAL UNIVERSITIES, INCLUDING THE UNIVERSITY OF TEXAS, THE UNIVERSITY OF FLORIDA, COLORADO STATE, AND

STEPHEN F. AUSTIN. I WAS THE CHIEF PSYCHOLOGIST AND MENTAL HEALTH OFFICER FOR THE TEXAS DEPARTMENT OF CORRECTIONS FOR A TIME. AND I'M IN PRIVATE PRACTICE.

Q ARE YOU THE HOLDER OF ANY HONORS OR AWARDS?

A OH, I HAVE BEEN LISTED IN SOME OF THOSE "WHO'S WHO," YOU KNOW, LEADERS IN THIS AND THAT AND ONE THING AND ANOTHER. I DON'T KNOW THAT THAT HELPS US THAT MUCH, MR. SPENCE –

Q HAVE YOU DONE ANY –

A – EXCEPT TO TAKE UP THESE FOLKS' TIME ON THEIR SATURDAY AFTERNOON.

Q I UNDERSTAND THAT.

HAVE YOU DONE ANY PUBLISHING? HAVE YOU WRITTEN –

A YES.

Q – ARTICLES?

A I HAVE WRITTEN – I HAVE SOMEWHERE BETWEEN FORTY-FIVE AND FIFTY ARTICLES.

Q NOW, I BELIEVE THAT YOU SAID THAT YOU WERE TEACHING PEOPLE AT ONE TIME AT TEXAS DEPARTMENT OF CORRECTIONS.

A YES. THAT'S CORRECT.

Q WHAT DID YOU DO THERE, SIR?

A I WAS THE CHIEF MENTAL HEALTH OFFICER FOR THE WHOLE SYSTEM [830] THERE. THAT INCLUDED OUR PSYCHIATRIC UNIT AND DRUG ABUSE PROGRAMS AND FORENSIC SERVICES AND WHATEVER CAME DOWN THE PIKE THAT NEEDED TO BE DONE THERE WITHIN THE DEPARTMENT – WAS IN MY DEPARTMENT.

Q DID YOU EVER SEE ANY DEATH ROW INMATES OR WORK WITH ANY DEATH ROW INMATES?

A YES.

Q HOW MANY WOULD YOU SAY, SIR?

A I THINK WHEN I LEFT THERE, WE HAD SIXTY-SOME-ODD ON DEATH ROW.

Q DID YOU EVER PARTICIPATE IN ANY DECISIONS TO EXECUTE ONE?

A YEAH. PART OF MY JOB THERE WAS TO GO EXAMINE THEM PRE-EXECUTION AND SEE IF THEY WERE FIT TO KILL. WE HAD A NUMBER COME VERY CLOSE; THOUGH, FORTUNATELY – OR UNFORTUNATELY, DEPENDING ON YOUR POINT OF VIEW – STAYS WERE FORTHCOMING ON EACH OF THOSE. BUT, YES, WE HAD ABOUT A DOZEN THAT I SO EXAMINED.

Q WELL, THEN I WOULD SAY – ARE YOU FAMILIAR WITH THE TEXAS DEATH STATUTE, THEN?

A YES, I'M QUITE FAMILIAR WITH THE TEXAS DEATH STATUTE.

Q OKAY. AND YOU ARE AWARE THAT THERE'S SOME SPECIAL ISSUES?

A YES, SIR.

Q OKAY. I BELIEVE SPECIAL ISSUE NUMBER 2 IS THE PROBABILITY OR POSSIBILITY OF FUTURE DANGEROUSNESS. YOU'RE AWARE OF THAT ONE?

[831] A YES.

Q AND YOU'RE FAMILIAR WITH IT?

A I'M FAMILIAR WITH IT.

Q OKAY. WOULD YOU EXPLAIN WHAT'S INVOLVED IN PREDICTING FUTURE BEHAVIOR AND FUTURE VIOLENT CONDUCT IN PARTICULAR?

A WELL, MR. SPENCE, MY – I'LL TRY TO NOT MAKE MY ANSWER TO YOUR QUESTION UNNECESSARILY LENGTHY, BECAUSE I CAN – I CAN APPRECIATE THAT THE EARS CAN UNDERSTAND ONLY WHAT THE BOTTOM CAN ENDURE. BUT I –

THE COURT: JUST ANSWER THE QUESTION, SIR.

THE WITNESS: YES, YOUR HONOR.

AND THERE ARE – THERE ARE TWO PARTS TO MY ANSWER TO YOUR QUESTION.

THE ISSUE OF PREDICTING BEHAVIOR GENERALLY, REGARDLESS OF THE KIND OF BEHAVIOR, AS MAY – THE FIRST THING YOU'VE GOT TO DO IS DECIDE PRECISELY WHAT BEHAVIOR YOU'RE TRYING TO PREDICT IN THE FUTURE, AND THAT NEEDS TO BE A REASONABLY PRECISE DEFINITION. THEN YOU HAVE TO TRY TO FIND WHAT THINGS ARE HISTORICALLY RELATED TO THAT AND FIND SOME

WAY OF COUNTING THAT AND RELATE THAT TO IT IN SOME KIND OF SIGNIFICANT WAY. THIS IS USUALLY DONE WITH A SERIES OF VERY COMPLEX MATHEMATICAL TECHNIQUES REFERRED TO AS "CORRELATIONAL PROCEDURES" OR SOMETHING LIKE THAT.

WE ALWAYS FIND WHEN WE'RE TRYING TO PREDICT ANY [832] PARTICULAR KIND OF BEHAVIOR THAT – THAT SOME THINGS WILL WORK TO PREDICT AND SOME THINGS WILL NOT. WE FIND THAT, AS A GENERAL PROPOSITION, OVER THE – THE LONGER TERM WE TRY TO MAKE PREDICTION OVER, THE LESS ACCURATE OUR PREDICTIONS TEND TO BE. AND IT DOESN'T MAKE TOO MUCH DIFFERENCE WHAT KIND OF BEHAVIOR WE'RE TALKING ABOUT, WHETHER IT BE SUCCESS IN SCHOOL OR CESSATION OF FINGER-BITING OR FIGHTER BOMBER TRAINING OR SOMETHING LIKE THAT. THINGS THAT PEOPLE DO VERY FREQUENTLY ARE GENERALLY MORE – OR THAT THEY ENGAGE IN WITH A HIGH DEGREE OF FREQUENCY TEND TO BE SOMEWHAT MORE PREDICTABLE THAN THINGS WHICH ARE LESS FREQUENT IN NATURE.

NOW, WITH RESPECT TO VIOLENT CONDUCT, IT AND OTHER KINDS OF BEHAVIOR WHICH ARE REFERRED TO AS "LOW BASE RATE BEHAVIORS" ARE TYPICALLY VERY HARD TO PREDICT, AND OUR LEVEL OF ACCURACY OF PREDICTION IS VERY – IS NOT VERY GOOD.

Q WHAT IS THE DIFFERENCE BETWEEN DIAGNOSING SOMEONE THAT'S DANGEROUS AND

THEIR ACTUAL BEHAVIOR? CAN YOU TELL WHAT'S ACTUALLY GOING TO HAPPEN?

A NOT VERY WELL. THERE'S BEEN A GREAT DEAL OF RESEARCH DONE ON TRYING TO PREDICT ACTUAL VIOLENT CONDUCT. AND WHENEVER WE DESCRIBE SOMEONE AS "DANGEROUS," WE'RE MAKING – WE'RE MAKING AN ATTRIBUTION TO THEM THAT – THAT THEY ARE AT GREATER RISK FOR VIOLENT CONDUCT THAN, SAY, A PERSON THAT [833] WE WOULD SAY IS "NONDANGEROUS."

WHENEVER WE ASSERT THAT SOMEONE IS DANGEROUS, WE'RE SAYING THAT HE'S MORE LIKELY TO ACTUALLY ACT OUT. HOWEVER, WHEN WE REACH THAT DIAGNOSIS – IT'S BEEN DEMONSTRATED IN STUDY AFTER STUDY THAT THAT DIAGNOSIS ACTUALLY LEADS TO – IS FOLLOWED BY VIOLENT CONDUCT ONLY ABOUT ONE IN THREE TIMES. SO YOU'RE WRONG – WHENEVER YOU SAY SOMEBODY IS DANGEROUS, SAY HE'S GOING TO DO SOMETHING VIOLENT OR AGGRESSIVE, YOU'RE GOING TO BE WRONG ABOUT TWICE AS OFTEN AS YOU'RE – AS YOU'RE RIGHT.

Q WELL, IN REGARD TO THE TEXAS DEATH STATUTE AND SPECIAL ISSUES, HAVE YOU EVER HEARD THE TERM "BURNOUT" USED IN REGARD TO A SITUATION LIKE THIS . . . PERTAINING TO A PERSON THAT HAS COMMITTED CRIMES WHEN HE WAS YOUNGER AND, WHEN HE GETS OLDER, HE GETS BURNED OUT?

A WELL, "BURNOUT" IS KIND OF A GENERIC – A BIG TERM, BUT, YEAH. IF I CAN TRY TO NARROW IT DOWN . . . MANY PEOPLE WHO ARE INVOLVED IN

CRIMES OF VARIOUS KINDS, PARTICULARLY CERTAIN KINDS OF VIOLENT CRIMES, WILL PRESENT A PARTICULAR – OR, YOU KNOW, SEVERAL DIFFERENT KINDS OF PSYCHOLOGICAL OR PSYCHIATRIC PICTURES THAT WILL – AND THE EXPERTS WILL GET TOGETHER AND ARGUE ABOUT THIS AND ARGUE ABOUT THAT, BUT WHAT – AND ARGUE ABOUT THE TREATABILITY OF THE CONDITION.

BUT WHAT IS VERY CLEAR FROM THE AVAILABLE DATA, A LOT [834] OF IT, FROM THE UNIFORM CRIME REPORTS THE F.B.I. PUBLISHES IS THAT VIOLENT CONDUCT IS PREDOMINANTLY, OVERWHELMINGLY THE PROVINCE OF THE YOUNG. YOUR HIGHEST INSTANCE OF VIOLENT CONDUCT IS IN ABOUT THE EIGHTEEN TO TWENTY-FIVE GROUP, AND THEN THERE IS A GRADUAL DIMUNITION [SIC] OF THE INCIDENTS OF VIOLENT CONDUCT AS TIME GOES – AS THE AGE GROUPS GET OLDER. BY THE TIME YOU GET THEM TO FORTY, IT BECOMES FAIRLY RARE; AND BY THE TIME THEY GET TO FIFTY, IT'S – IT'S REALLY RARE INDEED FOR A FIFTY-YEAR-OLD INDIVIDUAL TO BE INVOLVED IN SOME KIND OF VIOLENT OR AGGRESSIVE ACT. I MEAN, SURE, IT HAPPENS, BUT IT'S STATISTICALLY QUITE RARE.

Q HAVE YOU EVER SEEN TED COLE BEFORE TODAY, DR. DICKERSON?

A NO, SIR, I HAVE NOT.

Q HAVE YOU EVER EXAMINED HIM?

A NO, I HAVE NOT.

Q HAVE YOU LOOKED OVER DOCTOR – THE TESTS THAT DR. JARVIS WRIGHT GAVE MR. COLE?

A YES, SIR, I DID.

Q HAVE YOU DISCUSSED THOSE WITH HIM?

A BRIEFLY, YES, I HAVE.

Q HOW WELL DO THESE TESTS PREDICT FUTURE DANGEROUSNESS?

A REALLY, BASICALLY AT THE LEVEL I'VE ALREADY SAID, MR. SPENCE – I MEAN, I THINK CERTAINLY DR. WRIGHT DID A VERY THOROUGH JOB, AND HE HAS – I'M SURE, HAS A CONCLUSION [835] ABOUT THE SIGNIFICANCE OF THOSE TEST RESULTS. BUT WILL THEY PREDICT – WILL THEY – WILL THEY SAY BEYOND ANY SHADOW OF A DOUBT OR TO A CERTAIN LEVEL – I MEAN, THE LEVEL OF COMPETENCE HERE STILL DOES NOT EXCEED ONE IN THREE IF HE SAID THAT THE MAN IS DANGEROUS. BUT IF HE SAID THE MAN WAS NOT DANGEROUS, HOWEVER, HE WOULD BE RIGHT ABOUT – HE WOULD ONLY BE WRONG ABOUT SEVEN TIMES OUT OF HUNDRED THOUSAND. SO THEY DO A PRETTY GOOD DIRECTION – THEY DO A GOOD JOB IN ONE DIRECTION AND NOT SO GOOD A JOB IN THE OTHER DIRECTION.

Q ARE THERE ANY OTHER FORMS OF PSYCHIATRIC DIAGNOSIS WHICH WOULD CONFIRM FUTURE DANGEROUS CONDUCT?

A WELL, THERE – THERE ARE LOTS OF WAYS TO CONFIRM – OR, TO ASSESS THE FUTURE DANGEROUSNESS THINGS ... JUST SIT DOWN AND

TALK TO SOMEBODY; OR YOU CAN – YOU CAN ROLL DICE AND MAKE A GUESS, AS FAR AS THAT'S CONCERNED.

Q AND THAT'S ALL IT'S GOING TO BE, IS A GUESS?

A WELL, I THINK IT'S A LITTLE BETTER THAN A GUESS, BUT IT'S – BUT I'M TELLING –

Q AN EDUCATED GUESS.

A – YOU, YOU KNOW, WITH VERY – YOU KNOW, WITH – I HOPE, A FAIR DEGREE OF PRECISION WHAT THE ODDS ACTUALLY ARE BY ACTUAL EMPIRICAL RESEARCH. AND DR. WRIGHT'S TESTS OR ANY OTHER PSYCHIATRIC OR PSYCHOLOGICAL TESTS THAT CAN BE ADMINISTERED WILL NOT EXCEED THE ODDS THAT I'VE ALREADY [836] QUOTED. AND I KNOW THAT BECAUSE THERE – THEY – THERE HAVE BEEN REPEATED STUDIES THAT HAVE USED A VARIETY OF TECHNIQUES, A VARIETY OF PROCEDURES, AND ASKED LITERALLY HUNDREDS UPON HUNDREDS OF QUESTIONS, TRYING TO DETERMINE OR FIGURE OUT WHAT WOULD MORE RELIABLY PREDICT ACTUAL VIOLENT – FUTURE VIOLENT CONDUCT, AND – I MEAN, WE CAN – WE CAN ASK ALL THE QUESTIONS IN THE WORLD AND THROW EVERYTHING WE CAN FIND INTO THE POT, AND THAT'S STILL WHAT OUR ODDS ARE GOING TO BE.

Q WHAT DOES THE TERM "SOCIOPATH" MEAN TO YOU, DR. DICKERSON?

A WELL, IT'S KIND OF AN OUTDATED TERM, BUT "SOCIOPATH" IS A WORD THAT APPEARED IN

"DIAGNOSTIC STATISTICAL MANUAL II," REPLACING THE WORD "PSYCHOPATH," WHICH APPEARED IN "DIAGNOSTIC STASTICAL [sic] MANUAL I," THE AMERICAN PSYCHIATRIC ASSOCIATION. AND BASICALLY WHAT IT REFERS TO IS PEOPLE THAT BREAK THE LAW, THEY'RE NOT CRAZY, AND WE DON'T KNOW WHY. NOW, IT'S KIND OF A WASTEBASKET KIND OF DIAGNOSIS TO THE EXTENT IT'S A DIAGNOSIS AT ALL. IT'S JUST – IT'S A WORD THAT WE APPLY TO PEOPLE WHO ARE IN TROUBLE WITH THE LAW AS MUCH AS ANYTHING ELSE; BUT WE ALSO APPLY IT TO A LOT OF OTHER THINGS, CONDUCT THAT WE DON'T LIKE, WE THINK IS UNETHICAL OR IMMORAL IN SOME WAY.

BUT, THE SCIENTIFIC RESEARCH OR THE WORK THAT IS BEING DONE TRYING TO ELABORATE OR ILLUMINATE THIS CONCEPT – THE VERY EARLIEST LITERATURE ON THE SUBJECT WOULD REFER [837] TO MORAL IMBECILES, MORAL FOOLS. BY THE WAY, WOULD – THEY'RE TRYING TO – THEY WILL – A LOT OF WRITERS ARE BEGINNING TO DIFFERENTIATE BETWEEN SEVERAL POSSIBLE SUB-TYPES THAT ARE JUST NOT READILY APPARENT; ONE OF WHICH IS: WE'RE UNABLE TO COME UP WITH ANYTHING OTHER THAN IT SIMPLY PROBABLY ARISES CONSTITUTIONALLY AND AT A VERY EARLY AGE. AND THAT WILL BE EVIDENT FROM THE TIME THEY'RE FIVE OR SIX YEARS OLD. OTHERS WHO – WHOSE ANTISOCIAL TENDENCIES ARE NOT EVIDENT UNTIL THEY'RE THIRTEEN OR FOURTEEN. THERE'S CONSIDERABLE – THERE'S MOUNTING DEGREE OF RESEARCH THAT SUGGESTS THAT THIS IS – THAT

THIS MAY, IN FACT, BE A DISSOCIATIVE OR NEUROTIC KIND OF REACTION AND, THOUGH IT MAY SEEM TO BE THE SAME THING ON THE FACE OF IT, IT HAS A DIFFERENT KIND OF UNDERLYING CAUSE THAT – THAT PRODUCES THE SAME THING.

Q HOW DOES THE TEXAS DEPARTMENT OF CORRECTIONS TAKE CARE OF THESE TYPE OF PEOPLE, SOCIOPATHS OR ASSORTED VIOLENT BEHAVIOR TYPE PEOPLE?

A WELL, THEY LOCK THEM ALL UP. MOST OF THE PEOPLE WHO ARE IN T.D.C. COULD PROBABLY BE DIAGNOSED AS "SOCIOPATH" IN ONE WAY OR ANOTHER . . . IF YOU WANT TO USE THAT TERM. A SIGNIFICANT PORTION OF THEM HAVE BEEN ACCUSED OF SOME KIND OF VIOLENT ACT OR RAPE, MURDER, ARMED ROBBERY, KIDNAPPING, ALL THOSE GOOD THINGS.

THE – WHAT MOST OF THEM DO IS: THEY GO DOWN THERE, [838] AND THEY ENTER THE INSTITUTION, AND THEY'RE PUT TO WORK, AND THEY GO ON ABOUT THEIR BUSINESS AND LIVE THEIR LIFE IN THE INSTITUTION. NOW, FOR THE INDIVIDUAL WHO IS JUST ABSOLUTELY NOT GOING TO COOPERATE WITH THE INSTITUTIONAL ROUTINE, T.D.C. HAS SOME REALLY GOOD THINGS THAT THEY DO IN TERMS OF PROTECTING OTHER INMATES BY ISOLATING THOSE PEOPLE OR REFERRING THEM FOR MEDICAL AND PSYCHIATRIC ATTENTION, SEE IF SOME TREATMENT WOULD BE USEFUL TO THEM FOR THEIR AGGRESSIVE CONDUCT WITHIN THE INSTITUTION. AND THAT'S – THEY DO A GOOD JOB OF CONTROLLING THOSE THINGS.

Q WHEN WAS THE LAST TIME YOU WERE DOWN THERE?

A ABOUT TWO WEEKS –

Q . . . THE TEXAS DEPARTMENT OF CORRECTIONS.

A ABOUT TWO WEEKS AGO.

Q ABOUT TWO WEEKS?

A UH-HUH.

Q DO YOU KNOUT WHAT IT COSTS TO KEEP ANYONE THERE?

A JUST A SHADE OVER THIRTY-SIX DOLLARS A DAY.

Q THIRTY-SIX DOLLARS A DAY. WHAT DOES IT COST TO EXECUTE A PERSON, JUST ON THE AVERAGE, FROM –

A WELL, THERE'S SOME STUFF DONE ON THAT THE OTHER DAY. BY THE TIME YOU GET THROUGH WITH ALL OF THE LEGAL PROCESS THAT'S INVOLVED, IT'S COSTING RIGHT AROUND TWO MILLION DOLLARS AN EXECUTION RIGHT NOW.

Q HAVE YOU EVER BEEN CALLED TO TESTIFY FOR THE STATE?

[839] A YES, I HAVE.

Q HOW MANY TIMES?

A I DON'T KNOW.

Q HOW DO YOU FEEL ABOUT THE DEATH PENALTY?

A WELL, MR. SPENCE, I – YOU KNOW, I CAN SUPPORT A DEATH PENALTY –

MR. ALCALA: YOUR HONOR, I OBJECT. IT'S IRRELEVANT AS TO HIS OPINION OF THE DEATH PENALTY.

THE COURT: WHAT'S THE – WHAT'S THE RELEVANCY OF THIS QUESTIONING, MR. SPENCE?

MR. SPENCE: I'LL WITHDRAW THE QUESTION, YOUR HONOR.

THE COURT: MR. SPENCE, I'LL BE GLAD TO GIVE YOU A BROAD REIN IN REFERENCE TO YOUR LINE OF QUESTIONING.

YOU'VE WITHDRAWN THE QUESTION. PROCEED.

BY MR. SPENCE:

Q ARE YOU GOING TO TELL US HERE TODAY THAT TED'S NOT DANGEROUS?

A NO, I'M NOT.

Q WHAT CAN YOU SAY ABOUT HIS TENDENCIES OF CHANGING SINCE YOU'VE GONE OVER ALL THE REPORTS WITH DR. WRIGHT?

A WELL, MR. SPENCE, I SHOULD SAY I WILL – SINCE I HAVE NOT EXAMINED THE DEFENDANT, I WILL – I WILL REACH NO CONCLU-[840]SIONS. THERE ARE QUESTIONS THAT ARE RAISED IN MY MIND BY WHAT I'VE SEEN AND HEARD THUS FAR. ONE IS WITH RESPECT – IS CONSIDERED TO BE

DANGEROUS AT THIS POINT; AND THAT IS NOT AN UNREASONABLE ASSUMPTION, GIVEN THE EVIDENCE AVAILABLE TO US. FROM WHAT I KNOW, THERE IS – THERE IS GOOD REASON TO DOUBT THAT – THAT ON THIS – ON THE BASIS OF THE STATISTICAL DATA AVAILABLE TO US, THAT DIAGNOSIS WOULD NECESSARILY APPLY FIVE, TEN, FIFTEEN YEARS FROM NOW. I MEAN, WHATEVER CONDITION HE IS SUFFERING FROM IS NOT NECESSARILY IMMUTABLE AND UNCHANGABLE. I MEAN, IT CAN BE CHANGED – I MEAN, TIME CHANGES – I MEAN – AND EXPERIENCE CHANGES PEOPLE. CHANGES IN THE BODY CHANGE PEOPLE.

Q A PERSON JUST GETS OLD?

A OLD PERSON GETS OLDER. THEIR HORMONES CHANGE. THE BRAIN CHANGES. SO IT'S – I MEAN, JUST BECAUSE HE'S DANGEROUS – IF HE'S CONSIDERED DANGEROUS TODAY, DOES NOT NECESSARILY MEAN HE'S GOING TO BE DANGEROUS AT SOME FUTURE POINT IN TIME.

Q WELL, IF YOU – KNOWING WHAT YOU KNOW ABOUT THE CASE AND THE TESTS AND EVERYTHING, IF YOU FOUND OUT THAT HE ATTEMPTED SUICIDE WHILE HE WAS IN JAIL AWAITING TRIAL, WHAT WOULD THAT TELL YOU ABOUT HIM?

A WELL, IT WOULD TELL ME HE WAS VERY DISTRESSED AND DEPRESSED. BUT THE THING ABOUT SUICIDE, PEOPLE THINK [841] SUICIDE – WE USUALLY THINK SUICIDE IS BASED ON NO HOPE. BUT SUICIDE IS REALLY – IN MANY WAYS IS BASED ON HOPE, BUT DISAPPOINTING – I MEAN, HOPE THAT WE CAN BE SOMETHING THAT WE'RE NOT.

AND WHEN WE – PEOPLE ARE COMMITTED TO TRY TO MAKE SUICIDAL ATTEMPTS, IT'S OFTENTIMES BECAUSE THEY'RE VERY ANGRY AT THEMSELVES FOR NOT HAVING BEEN WHAT THEY THOUGHT THEY MIGHT BE.

Q WHAT WOULD A PERSON – WHAT WOULD – IF A PERSON WAS TO WRITE IN A DIARY THAT HE WOULD LIKE TO GO TO SOUTH AMERICA, THE CARIBBEAN, THE MEDITERRANEAN, BECOME A PIRATE, A VIKING, AND ROB, PILLAGE, RAPE, PLUNDER, WHAT WOULD THAT TELL YOU ABOUT A PERSON?

A JUST BY ITSELF?

Q YEAH.

A WELL, IT'S – YOU KNOW, IT'S KIND OF UNUSUAL DANGERING A LITTLE BIT; BUT, IN AND OF ITSELF, I WOULD NOT TAKE THAT AS BEING ABSOLUTELY CONFIRMATORY OF ANYTHING EXCEPT THAT THEY'D THOUGHT ABOUT IT AND PERHAPS FOUND IT A BIT ENTERTAINING OR TITILLATING.

Q I BELIEVE DR. WRIGHT SAID IN MR. COLE'S CASE THAT IT WAS HIS FANTASIES COMING OUT.

A WELL, IT MAY BE A FANTASY, MR. SPENCE, BUT – YOU KNOW, HOW MANY TIMES HAVE YOU SAID, "I WISH I HAD A CABIN UP IN THE MOUNTAINS WITHOUT A TELEPHONE"? IS THAT A FANTASY OR JUST SOMETHING THAT SEEMED LIKE A GOOD IDEA TO YOU AT THE [842] TIME? I MEAN, YOU'RE LIKELY TO THINK OF SOMETHING LIKE THAT ON – ON A REALLY BAD DAY THAN ON A REALLY GOOD DAY. AND THE SAME COULD BE SAID

ABOUT THE CARIBBEAN AND PIRACY OR ALL OF THAT STUFF. MAYBE IT'S A BAD DAY. MAYBE IT'S FANTASY THAT'S – THAT'S CLINICALLY QUITE SIGNIFICANT. I DON'T KNOW.

Q NOW, THE EVIDENCE THAT YOU KNOW ABOUT MR. COLE FROM JARVIS WRIGHT – DR. WRIGHT'S TESTS, WOULD THAT SUPPORT THE DIAGNOSIS OF TED BEING A PSYCHOPATH OR A SOCIOPATH?

A IT COULD WELL BE CONSISTENT WITH – WITH THAT. IT'S ALSO CONSISTENT WITH SEVERAL OTHER POSSIBILITIES. ONE IS THE POSSIBILITY OF AN ATTRIBUTIVE SOCIATIVE REACTION IN WHICH THE INDIVIDUAL IS SIMPLY BLOCKING A LOT – A LOT – I MEAN, IT'S ALMOST A MULTIPLE PERSONALITY KIND OF THING WHERE – I MEAN, YOU GET HIM ACTING ONE WAY DURING ONE PERIOD OF TIME AND THEN A 180 DEGREES DIFFERENT ANOTHER PERIOD OF TIME. YOU KNOW, WE'VE HAD – SEEN SEVERAL MOVIES OF THIS SORT OF THING ON T.V. AND I THINK THE SYBIL CASE WAS – WAS – THAT HAD SALLY FIELD IN IT WAS CERTAINLY AN EXAMPLE OF THAT. THAT IS A POSSIBILITY, AND IT'S CERTAINLY NOT ANYTHING – AS I'VE ALREADY SAID, YOU KNOW, THERE – THERE'S A GOOD DEAL OF THINKING THAT THERE ARE SOME FORMS OF SO-CALLED "SOCIOPATHY" THAT MAY, IN FACT, BE DISSOCIATIVE REACTIONS. THAT IS POSSIBLE.

[843] MR. SPENCE: PASS THE WITNESS, YOUR HONOR.

THE COURT: LET'S TAKE A SHORT RECESS IF WE CAN AT THIS TIME. WE'VE BEEN HERE FOR

QUITE AWHILE. WE'RE GOING TO TAKE ABOUT A FIFTEEN-MINUTE RECESS. I WANT THE BAILIFF TO GIVE THE JURORS AN OPPORTUNITY TO GET A DRINK IF WE HAVE SOME STILL AVAILABLE. IF WE DON'T, WE'LL GO GET SOME MORE. IF YOU'LL GO TO THE JURY ROOM AND TELL THEM WHAT YOUR ORDER IS, WE'LL GET YOU SOMETHING TO DRINK AND ALLOW YOU TO USE THE RESTROOM.

[RECESS]

[THEREAFTER, THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF ALL PARTIES BUT OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: WE'RE BACK ON THE RECORD OUTSIDE THE PRESENCE OF THE JURY.

THE STATE HAS INDICATED THEY DESIRE TO RELEASE DR. COONS AND RELEASE HIM FROM THE RULE, LET HIM GO ABOUT HIS BUSINESS. DO YOU HAVE ANY OBJECTION TO THAT, MR. SPENCE?

MR. SPENCE: I HAVE NO OBJECTION TO THAT, YOUR HONOR.

[844] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

THE COURT: DR. COONS IS RELEASED. HE IS RELEASED FROM THE RULE. HE MAY GO ABOUT HIS BUSINESS AS HE DESIRES. SOMEBODY NOTIFY HIM OF THAT.

WHERE IS DR. COONS? UPSTAIRS?

MR. FOHN: HE'S UPSTAIRS. I'LL CALL HIM.

THE COURT: ALL RIGHT.

[THEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS.]

THE COURT: ARE WE READY TO PROCEED?

MR. FOHN: YES, YOUR HONOR.

THE COURT: DEFENDANT READY TO PROCEED?

MR. SPENCE: YES, YOUR HONOR.

THE COURT: BRING THE JURY IN, PLEASE.

[THEREUPON, A DISCUSSION WAS HAD OFF THE RECORD.]

[THEREAFTER, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

[845] THE COURT: BE SEATED.

THE RECORD WILL REFLECT ALL PARTIES ARE PRESENT. THE JURY IS IN THE BOX.

THE DEFENDANT'S COUNSEL HAD COMPLETED DIRECT EXAMINATION OF THIS WITNESS, AND THE STATE WAS ABOUT TO TAKE THE INDIVIDUAL ON CROSS EXAMINATION. YOU MAY PROCEED.

MR. ALCALA: THANK YOU, YOUR HONOR.

CROSS EXAMINATION

BY MR. ALCALA:

Q NOW . . . DOCTOR, NOW, YOU'RE – YOU ARE A PSYCHOLOGIST; IS THAT CORRECT, SIR?

A THAT'S CORRECT.

Q ALL RIGHT. AND YOU ARE NOT A MEDICAL DOCTOR, ARE YOU?

A NO.

Q AND YOU ARE NOT A PSYCHIATRIST?

A NO.

Q DO YOU KNOW DR. RICHARD COONS OF AUSTIN, TEXAS?

A I HAVE MET DR. COONS, YES.

Q AND DO YOU KNOW OF HIS REPUTATION AS A PSYCHIATRIST?

A HIS REPUTATION IS QUITE GOOD, SIR. I HOLD HIM IN HIGH REGARD.

Q OKAY. NOW, DR. DICKERSON, YOU UNDERSTAND THAT THIS IS THE PUNISHMENT HEARING IN A CAPITAL MURDER CASE OF THE DEFENDANT TED CALVIN COLE, DO YOU NOT, SIR?

[846] A I DO.

Q OKAY. AND YOU UNDERSTAND, OF COURSE, THAT THE ISSUE IS WHETHER THERE'S A PROBABILITY THAT THE DEFENDANT WOULD COMMIT

CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY; IS THAT CORRECT?

A I UNDERSTAND THAT TO BE THE LANGUAGE OF THE STATUTE.

Q ALL RIGHT, SIR. AND YOU STATED THAT YOU HAVE NOT PERSONALLY VISITED WITH THE DEFENDANT, TED CALVIN COLE, AT ALL; IS THAT RIGHT?

A I HAVE NOT.

Q ALL RIGHT. NOW, SIR, SINCE THIS IS THE PUNISHMENT HEARING, IF WE CAN GET RIGHT TO THE HEART OF THE MATTER; AND IF YOU WOULD, BEAR WITH ME AND ASSUME THE FOLLOWING FACTS IN ORDER TO ANSWER THE QUESTIONS. AND I'LL PUT IT IN THE TERM OF A HYPOTHETICAL. IF YOU WOULD, ASSUME THE FOLLOWING FACTS:

ASSUME, PLEASE, FOR THE PURPOSES OF THE QUESTION AT THE END, THAT WHEN A PERSON WAS SIXTEEN – A MALE PERSON WAS SIXTEEN YEARS OLD, THAT HE AND HIS BEST FRIEND GO OUT TO THE LAKE AND THERE THIS SIXTEEN-YEARS OLD PERSON SHOOTS HIS BEST FRIEND IN THE THROAT IN ORDER TO OBTAIN HIS CAR TO GO TO DALLAS. OKAY?

ASSUME THAT HE WAS ARRESTED AND TRIED – AND A STATEMENT TAKEN FROM HIM, IN WHICH HE SAYS HE SHOT HIS FRIEND IN THE THROAT IN ORDER TO OBTAIN HIS CAR. AND [847] FURTHER ASSUME THAT DURING THE TRIAL – OR, THAT HE

PLED "GUILTY" AND RECEIVED A FIFTEEN-YEAR SENTENCE FOR MURDER.

ASSUME FURTHER THAT WHEN HE GETS OUT OF THE PENITENTIARY THAT HE THEN GOES TO LIVE WITH A FAMILY IN DALLAS; AND THERE, SOMETIME IN THE YEAR 1981 OR '82, HE COMMITS AGGRAVATED SEXUAL ABUSE ON TWO YOUNG MEN, ONE EIGHT OR NINE YEARS OLD AND ANOTHER ELEVEN, BY COMMITTING ORAL SEX ON THOSE BOYS. AND FURTHER ASSUME THAT THE MAN THAT WE'RE TALKING ABOUT, THEN BEING AN ADULT OF THE AGE OF – IN HIS EARLY TWENTIES AT THAT TIME AND OUT OF THE PENITENTIARY, ATTEMPTS ANAL INTERCOURSE WITH ONE OF THE BOYS.

ASSUME FURTHER THAT UPON INVESTIGATION OR DISCOVERY BY THE MOTHER THAT SHE CONTACTS THE POLICE AND THAT THEY COME AND THEY OBTAIN A VALID CONSENT TO SEARCH HIS ROOM, AND THEY FIND NEWSPAPER ARTICLES FROM DIFFERENT PLACES IN THE UNITED STATES AND CANADA, EVIDENCING ACTS OF SEXUAL ABUSE AND/OR JUST MATTERS OF SEXUAL ABUSE AND MURDER OF YOUNG BOYS IN THIS PERSON'S ROOM. FURTHER ASSUME THAT HE IS CONVICTED OF THAT OFFENSE AND PLEADS "GUILTY" TO A FIFTEEN-YEAR SENTENCE.

FURTHER ASSUME THAT WHEN HE GETS OUT OF THE PENITENTIARY ON THAT OCCASION AND INDEED ON THE – ON DECEMBER – SOMETIME ON DECEMBER 12TH, HIM AND OTHERS PLAN – DECEMBER 12TH, 1987, PLAN TO KILL AN ELDERLY PERSON WHOM THEY HAVE ALREADY MET; THIS

PERSON BEING A MAN OF SIXTY-[848] SIX YEARS OF AGE, HAVING A GLASS – ONE GLASS EYE, THE OTHER EYE BEING LEGALLY BLIND, AND HIM – AND HE ALSO HAVING AN ENLARGED HEART AND PROBLEMS WITH HIS HEART, LIVING ALONE IN A SMALL APARTMENT COTTAGE BEHIND A LARGER HOUSE.

FURTHER ASSUME THAT THEY PLAN TO ROB THIS OLD MAN AND KILL HIM SOME TWO – ONE TO TWO DAYS BEFORE IN ORDER TO GET MONEY TO LEAVE – TO LEAVE TO ANOTHER – ANOTHER PLACE – TO ESCAPE TO ANOTHER STATE OR PLACE.

AND FURTHER ASSUME THAT ON THE 13TH OF DECEMBER THEY TAKE A CAB OVER TO THE – OVER TO A STORE NEAR WHERE THIS ELDERLY MAN LIVED.

FURTHER ASSUME FOR THE PURPOSES OF THE QUESTION I WILL ASK YOU THAT THEY ARRIVE THERE – OR, RIGHT BEFORE THEY ARRIVE, THIS INDIVIDUAL THAT WE'RE TALKING ABOUT MAKES THE STATEMENT THAT "I WILL" – "I WILL KILL HIM THE FIRST CHANCE I GET," SOMETHING TO THAT EFFECT; THAT THEY GET INTO THE HOUSE, AND THAT AT SOME OPPORTUNITY WITHIN THE HOUSE THAT HE USES A LEASH, A DOG LEASH MADE OUT OF SOME STRONG MATERIAL, THAT HE HAD BROUGHT WITH HIM AND HAD WITH HIM WHEN HE WAS PLANNING THIS MATTER; THAT HE SLIPS THE NOOSE – THE LEASH AROUND THE ELDERLY GENTLEMAN'S NECK AND TAKES HIM DOWN TO THE FLOOR AND SITS ON HIS BACK AND STRANGLES

THE OLD MAN UNTIL HE DIES AND THEN PROCEEDS TO TIE A KNOT IN THE DOG LEASH, MAKING THE LOOP AROUND THE [849] NECK TIGHT AND VERY SMALL.

ASSUME FURTHER THAT THEN – AND WHILE HE'S STRANGLING THE OLD MAN, HE SAYS, "HURRY UP AND DIE."

FURTHER ASSUME FOR THE PURPOSE OF THE QUESTION THAT I WILL ASK AT THE END THAT HE THEN LOOKS AROUND THE HOUSE FOR MONEY.

FURTHER ASSUME THAT HE THEN IS ARRESTED THERE AT THE SCENE THE NEXT DAY. FURTHER ASSUME THAT BEFORE HE'S ARRESTED, THAT AFTER THE – SOMETIME AFTER THIS KILLING, THAT HE GOES TO THE STORE, COMES BACK TO THE APARTMENT WHERE THE BODY IS – AND BUYS BEER AND BRINGS IT BACK AND BUYS SOME FOOD AND EATS IT RIGHT THERE WHERE THE DECEASED – AND GOING BACK AND ASSUMING CERTAIN FACTS BEFORE THAT FACT, THAT HE – AFTER HE STRANGLES THE BODY, HE WRAPS THE BODY IN AN ARMY BLANKET AND THEN TAKES A TOWEL AND WRAPS IT AROUND HIS HEAD AND SECURES IT WITH CLOTHESPINS AND THEN PUTS THE BODY FACE DOWN UNDER THE BED, AND THEN HE GOES AND BUYS THE BEER AND THE FOOD, AND THEY COME – HE COMES BACK, AND HE PREPARES IT AND EATS IT THERE.

FURTHER ASSUME HE'S ARRESTED THE NEXT DAY AT THE SCENE WHILE THERE WITH THE BODY. AND FURTHER ASSUME THAT HE IS TAKEN TO JAIL,

AND WHILE IN JAIL HE WRITES A THREATENING LETTER TO ONE OF THE CO-DEFENDANTS.

FURTHER ASSUME THAT PRIOR TO ALL OF THIS AND DURING SOME MONTHS BEFORE THE KILLING THAT HE HAS A DIARY IN [850] WHICH HE WRITES SUCH THINGS SUCH AS – WHILE HE'S NOT IN CUSTODY, WHILE HE'S FREE, HE WRITES SUCH THINGS AS ON 10-25-87, "MET SOME CUTE LITTLE TWELVE-YEAR-OLD NAMED 'CODY.' I WOULD LIKE TO HAVE HIM SOONER OR LATER," AND THAT HE FURTHER WRITES, "I'M GOING TO FIGURE OUT HOW TO TAKE CODY WITH ME; AND IF HE WON'T GO, I'M GOING TO AT LEAST HAVE HIM BEFORE I GO."

AND THEN ON OCTOBER 28TH, 1987, "I'M SICK OF THIS HUMDRUM EXISTENCE. I NEED SOME EXCITEMENT SO I CAN FEEL" LIKE I'M ABOUT – "THAT I'M ALIVE ONCE IN AWHILE. I WANT TO GO FIND SOMEONE WHO'S YOUNG, ATTRACTIVE, AND WITH A SENSE OF ADVENTURE, WITH WHOM I CAN ROAM AROUND THE WORLD, SAILING IN THE SOUTH PACIFIC AND THE CARIBBEAN, EXPLORING THE MEDITERRANEAN, PARTYING SOMEWHERE IN . . . SOUTH AMERICA JUNGLES" – "IN THE SOUTH AMERICA JUNGLES, SMUGGLING, STEALING, ROBBING, RAPING, AND PILLAGING . . . MODERN-DAY VIKINGS OR PIRATES . . . BECAUSE I NEVER GET ANYWHERE." WELL, SUFFICE IT THERE.

ASSUME THOSE FACTS, SIR.

NOW, FOR THE PURPOSE OF THIS QUESTION, SIR, IF YOU COULD ASSUME THOSE FACTS, I WOULD LIKE TO ASK YOU: IF YOU KNEW THOSE FACTS AND IF YOU ASSUME THEM REGARDING

THAT INDIVIDUAL AND THE ACTION HE'S COMMITTED AND THE THINGS HE'S WRITTEN, IN YOUR MIND, IN YOUR PROFESSIONAL OPINION AND EXPERIENCE, WOULD THERE BE A PROBABILITY THAT THAT [851] PERSON WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?

A MR. ALCALA, I'M – I DON'T MEAN TO QUIBBLE WITH WORDS – I MEAN – I MEAN, IF YOU'RE GETTING AT "WOULD I BE ALARMED AND WOULD I BE CONCERNED ABOUT THE FUTURE CONDUCT OF SUCH AN INDIVIDUAL?" YES.

YOU USE THE WORD "PROBABILITY." I MEAN, YES, THERE ABSOLUTELY IS A PROBABILITY THAT THEY WOULD COMMIT – COMMIT FUTURE ACTS OF VIOLENCE.

Q THANK YOU, SIR.

A BUT, I MEAN – IF I MAY FINISH MY ANSWER ... BUT THE WORD "PROBABILITY" APPLIES TO LESS LIKELY AS WELL AS TO MORE LIKELY EVENTS. THERE'S ALSO A PROBABILITY THAT YOU WILL COMMIT FUTURE ACTS OF VIOLENCE AND MR. SPENCE AND THIS MAN AND EVERY MEMBER OF THE JURY AND MYSELF AS WELL. IT'S A PROBLEM OF SEMANTICS OR LANGUAGE. "WOULD I BE CONCERNED ABOUT THE FUTURE DANGER OF THE PERSON?" YES.

MR. ALCALA: THAT'S ALL I HAVE OF THIS WITNESS, YOUR HONOR.

THE COURT: ANYTHING ELSE?

MR. SPENCE: I HAVE NOTHING FURTHER, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

MAY THIS WITNESS BE EXCUSED?

MR. SPENCE: YES, YOUR HONOR.

* * *

No. CR88-0043-A

THE STATE OF TEXAS	)(	IN THE DISTRICT COURT OF
VS.	)(	TOM GREEN COUNTY, TEXAS
TED CALVIN COLE	)(	51ST JUDICIAL DISTRICT

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. ONE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is "Yes"; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue "No".

Respectfully submitted,

/s/ Bob Spence
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. One is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. TWO

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that, in order to answer any of the Special Issues "yes", the Jury must believe unanimously, beyond a reasonable doubt, that the true answer to the Issue is "Yes". In order to answer any Issue "No", however, it is only necessary that ten of the jurors believe that the correct answer is "No". An answer of "No" may be given to any of the Issues if:

"1) at least ten (10) jurors have a reasonable doubt as to whether or not the correct answer should be "Yes"; or

"2) if at least ten (10) jurors find that mitigating factors against the imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you; or

"3) if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the issues is 'Yes'."

Respectfully submitted,

/s/ Bob Spence
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Two is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. THREE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that you may answer any of the Special Issues "No" if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ B S
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FOUR

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that you may answer Special Issue One "No" if you find any aspect of the Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ B S
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Four is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FIVE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that you may answer Special Issue Two 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ B S

Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Five is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

IN THE DISTRICT COURT OF
TOM GREEN COUNTY, TEXAS
51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

COURT'S CHARGE ON PUNISHMENT

MEMBERS OF THE JURY:

By your verdict returned in this case you have found the defendant, TED CALVIN COLE, guilty of the offense of capital murder which was alleged to have been committed on or about the 13th day of December, 1987 in Tom Green County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions called "Special Issues", in this charge. The Court instructs you further, however, as follows:

1. The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

2. The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes" ALL jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such Issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an Issue beyond a reasonable doubt, then the Presiding Juror will so record the Jury's answer to such issue by signing the Presiding Juror's

name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any Juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such Juror should vote "no" to that Special Issue in the Jury's deliberations.

If ten (10) Jurors or more vote "NO" as to any Special Issue, then the answer of the Jury shall be "NO" to that Issue, and the Presiding Juror will so record the Jury's answer by signing the Presiding Juror's name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the Jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "NO", then there shall be no answer for that Special Issue, (i.e. that particular issue shall remain unanswered) and the Presiding Juror's shall NOT sign the Presiding Juror's name to any answer form for that Special Issue.

3. You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case where in you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

4. You are instructed that if there is any testimony before you in this case regarding the defendant's having

committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony or evidence for any purpose, unless you first believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then, you may only consider the same only in connection with your determination of Special Issue No. 2.

5. During your deliberations you are not to consider or discuss any possible action of the Board of Pardons and Paroles, or of the Governor, or how long the defendant would be required to serve to satisfy a sentence of life imprisonment.

The Special Issues, with forms for your answers are as follows:

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, TED CALVIN COLE, that caused the death of the deceased, RAYMOND C. RICHARDSON, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER:

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

[Illegible]_____
Presiding Juror

OR

We, the Jury, because at least ten (10) Jurors have a reasonable doubt as to the matter inquired about

in this Special Issue, find and determine that the answer to this Special Issue is "No".

_____
Presiding Juror

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, TED CALVIN COLE, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER:

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

[Illegible]
Presiding Juror

OR

We, the Jury, because at least ten (10) Jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No".

_____
Presiding Juror

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony, but the law you [illegible] receive in these written instructions, and you must be governed thereby.

You are instructed that the law provides that the failure of the defendant to testify shall not be taken as a circumstance against him, and you must not allude to, comment

on, or discuss in your retirement the failure of the defendant to testify.

In considering your verdict you shall not receive or consider, refer to or discuss any matter or testimony other than now in evidence before you.

After argument of counsel you will retire and consider your verdict, and after you have arrived at your verdict the Special Issues in the body of this charge shall be answered in accordance with the instructions given you in paragraph 2 of the charge. In addition, the Presiding Juror shall sign the verdict appearing below.

After you have retired to consider your verdict NO ONE has any authority to communicate with you except the officer who has you in charge, and who is referred to as the "bailiff." If you desire to communicate with the Court, you must place your communication in writing, SIGNED BY THE PRESIDING JUROR, and forward the writing on through the bailiff. DO NOT ATTEMPT TO TALK TO THE BAILIFF, THE ATTORNEYS, OR THE COURT CONCERNING ANY QUESTION YOU MAY HAVE. After the attorneys have completed their arguments, the bailiff will take you to the jury room and you will proceed with your deliberations. When you have reached a verdict the Presiding Juror will then notify the bailiff, who will arrange to have you return to the courtroom.

Signed at 3:11 o'clock p.m. on JUN 4 1988

/s/ Randol L. Stout
Randol L. Stout
Judge Presiding

VERDICT OF THE JURY

We, the Jury, return in open court the above answers as our answers to the Special Issues submitted to us, and the same is our verdict in this case.

[Illegible]
Presiding Juror

CAUSE NUMBER CR88-0043-A

THE STATE OF TEXAS	> IN THE DISTRICT COURT OF
VERSUS	> TOM GREEN COUNTY, TEXAS
TED CALVIN COLE	> 51ST JUDICIAL DISTRICT

* * *

[870] YOUR HONOR, LADIES AND GENTLEMEN OF THE JURY:

WHEN WE FIRST BEGAN VOIR DIRE, THERE WAS SOME APPREHENSION BY MEMBERS OF THE JURY ABOUT – DIDN'T KNOW WHAT THE EVIDENCE WAS, WHAT IT WAS GOING TO BE, AND THAT HAD SOMETHING TO DO WITH THE WAY YOU WERE GOING TO ANSWER YOUR QUESTIONS. WELL, AT THIS POINT IN TIME IT'S ALL IN. IT'S ALL THERE. ALL THE EVIDENCE THAT YOU ARE TO CONSIDER IS BEFORE YOU. NOTHING THAT I SAY, NOTHING THAT MR. SPENCE WILL SAY FOLLOWING ME IN CLOSING ARGUMENT, IS EVIDENCE. WHAT I WOULD LIKE TO DO WITH YOU IS TO POINT OUT THAT EVIDENCE THAT IS IMPORTANT, THAT'S THERE FOR YOU TO REMEMBER AND TO LOOK AT.

NOW, THE JUDGE HAS JUST GONE OVER WITH YOU THE SPECIAL ISSUES, SPECIAL ISSUE NUMBER 1, NUMBER 2. IN THE FIRST – THAT FIRST QUESTION THAT YOU HAVE TO ANSWER – AND THAT'S CONSIDERING THE EVIDENCE THAT'S BEFORE YOU. AND I'LL REMIND YOU THAT THE FIRST THING THE STATE DID IN THIS PHASE OF THE TRIAL WAS TO REINTRODUCE ALL OF THE EVIDENCE THAT HAD BEEN PRESENTED IN THE GUILT-INNOCENCE PHASE; SO ALL OF THAT TESTIMONY

FROM THE STAND, FROM THOSE LIVE WITNESSES, THE STATEMENTS, THE CONFESSIONS, THE PHOTOGRAPHS, THE DIAGRAM, ALL OF THAT IS THERE FOR YOUR CONSIDERATION IN ANSWERING THESE QUESTIONS.

THAT FIRST QUESTION YOU'VE GOT TO ANSWER, "WAS THE CONDUCT OF THE DEFENDANT, TED CALVIN COLE, THAT CAUSED THE [871] DEATH OF THE DECEASED, RAYMOND C. RICHARDSON, COMMITTED DELIBERATELY AND WITH THE REASONABLE EXPECTATION THAT THE DEATH OF THE DECEASED OR ANOTHER WOULD RESULT?"

LET'S LOOK AT WHAT THAT EVIDENCE IS IN THE CASE.

IF YOU'LL REMEMBER, IN LISTENING TO THE TESTIMONY, THAT THERE WAS TALK THE NIGHT BEFORE ABOUT KILLING "POPS"; "POPS" BEING MR. RICHARDSON. THE LEASH WAS TAKEN OVER THERE. IT HAD BEEN KEPT FOR A LONG TIME, HAD BEEN PICKED UP AND, AGAIN, THE NIGHT BEFORE, PLACED WITH THE DEFENDANT AND BROUGHT WITH HIM TO THAT HOUSE.

REMEMBER THE WAY – AND "WE TALKED ABOUT PLANNING IT . . . NO NOISE. WE DON'T WANT TO DISTURB THE NEIGHBORS." DISTURB MR. RICHARDSON. THEY DIDN'T WANT TO DISTURB THE NEIGHBORS.

MR. COLE – THE DEFENDANT'S OWN STATEMENT BEFORE THEY GET TO THE HOUSE, "THE FIRST CHANCE, I'M GOING TO KILL HIM." THERE'S NO EVIDENCE OF PROVOCATION. HE WAITED TO

PUT THAT LEASH AROUND MR. RICHARDSON'S NECK UNTIL HE WAS AT A POINT WHERE THEY WEREN'T GOING TO CAUSE PROBLEMS OF NOISE, WHERE HE WAS CLEAR FROM EVERYTHING. HE WAS IN THE DOORWAY OF THE KITCHEN. AND HE CAME UP FROM BEHIND HIM, AND HE PUT THAT LEASH AROUND HIS NECK. HE INTENDED TO DO WHAT HE DID BY THE METHOD IN WHICH HE TIED THAT KNOT WHERE THERE WOULD BE NO PRESSURE LET UP ON MR. RICHARDSON. AS DR. DI MAIO TELLS YOU, THAT HE WOULD PASS OUT IN FIFTEEN, [872] SECONDS, HIS ABILITY TO BREATHE WOULD STOP IN A MINUTE AND A HALF TO TWO MINUTES IF THE PRESSURE WASN'T RELEASED, AND IN TWO TO THREE MINUTES AFTER THAT, HE WOULD DIE.

IT WAS DELIBERATE FROM THE STANDPOINT OF KELLY HICKEY'S TESTIMONY THAT SHE HEARD COLE SAYING, "DIE ... HURRY UP AND DIE." HE KNEW WHAT HE WAS DOING. IT WAS PLANNED OUT.

AND WHEN YOU GET IN THE JURY ROOM, YOU'RE GOING TO HAVE AN OPPORTUNITY TO LOOK AT THIS DEFENDANT'S EXHIBIT NUMBER 3 AND STATE'S EXHIBIT NUMBER 41, THE DIARY – THE COPIES OF THE DIARY. AND I WANT – THE STATE WANTS YOU TO LOOK AT THAT CAREFULLY, BECAUSE THAT DIARY NOT ONLY TALKS ABOUT THOUGHTS OF MR. COLE, BUT IT TALKS AND SHOWS YOU THAT FUTURE PLANNING THAT HE WAS DOING AND PREPARATION FOR THIS. IT SHOWS HIS DESPERATION, HIS WANTING TO GET OUT OF TOWN.

PAGE 20: "WHAT I'D REALLY LIKE TO DO IS GET OUT OF TEXAS WITH SOMEONE YOUNG AND CUTE AND GO TO FLORIDA OR CALIFORNIA OR EVEN MEXICO, SOMEWHERE WHERE IT'S WARM AND SUNNY ALL YEAR AROUND, BUT I NEED MONEY. I NEED TRANSPORTATION." THE SEED'S THERE. HIS PLANNING'S THERE. "I'VE GOT TO" GET TO "THE POINT WHERE I HATE THIS PLACE AND EVERYTHING ABOUT IT. I'VE GOT TO GET AWAY. I JUST DON'T KNOW HOW TO GET IT DONE."

SAME PAGE, NOVEMBER 4TH: "I SAW MCBRIDE YESTERDAY." [873] KELLY HICKEY TOLD YOU MCBRIDE WAS MR. COLE'S – THE DEFENDANT'S PAROLE OFFICER. "SAW McBRIDE YESTERDAY. GOT HIM CONVINCED THAT EVERYTHING'S OKAY, BUT I HAVEN'T BEEN TO WORK SINCE LAST THURSDAY. PLANNING TO GO TO FLORIDA SOMETIME AFTER FRIDAY."

PAGE 22, DECEMBER 2ND: "LOTS OF CATCHING UP TO DO." SATURDAY, THE 7TH, REFERRING TO NOVEMBER THE 7TH:

"MIKE, KELLY, AND I WENT TO POPS," MR. RICHARDSON'S, "AND LEFT WITH HIS LAST TEN DOLLARS."

HE KNEW WHERE TO GET THE MONEY. HE KNEW WHERE THE PLANNING WAS GOING.

FRIDAY THE 27TH, PAGE 25: "MOM GAVE US A HUNDRED DOLLARS. LES TOOK US OUT TO THE TRUCK-STOP ABOUT 3:00 O'CLOCK." AND THEN IT GOES ON FOR THREE PAGES OF HIS ATTEMPT TO

LEAVE AND – LEAVE THIS TOWN AND AS FAR AS GETTING AS FAR AWAY AS MASON.

AND AT ONE POINT ON PAGE 27, TO SHOW HIS ABILITY TO PLAN AND THINK THINGS OUT, "KEN HAD BROUGHT SOME BEER AND WAS GETTING PLENTY WASTED, AND I WAS AFRAID HE'D GET US ALL LOCKED UP; SO I WENT TO THE DAIRY QUEEN AND ARRANGED FOR A WAITRESS THERE TO CALL THE COPS. AFTER THEY PICKED KEN UP, MIKE AND I WENT BACK TO THE TRUCK-STOP AND WAITED THERE, DRINKING COFFEE UNTIL THEY CLOSED." HE GOT RID OF HIS STUMBLING BLOCK. HE GOT RID OF THE THING THAT WAS IN HIS WAY TO ACCOMPLISH HIS DESIRE.

[874] LATER, SAME PAGE: "WE'D BE BETTER OFF BEING IN SAN ANGELO AND GETTING MORE MONEY TOGETHER TO TAKE THE BUS TO OKLAHOMA TO STAY WITH KEITH FOR A COUPLE OF DAYS OR WEEKS AND THEN GO ON TO CALIFORNIA."

PAGE 28: "I SUPPOSE TEXAS WILL HAVE A WARRANT OUT FOR ME BY NOW FOR JUMPING MANDATORY SUPERVISION; SO I'LL HAVE TO LAY LOW FOR AWHILE UNTIL I CAN GET SOME MONEY TOGETHER AND GET OUT OF THE STATE."

YOU SEE THE PLANNING? YOU SEE WHAT HE'S DOING, WHERE HIS THOUGHT PROCESS IS?

LATER THAT SAME PAGE: "SOMETHING SHOULD BREAK FRIDAY NIGHT. IF IT DOES, WE'LL BE IN OKLAHOMA SATURDAY."

DECEMBER 3RD: "TODAY IS THURSDAY, AND IF ALL GOES WELL TOMORROW NIGHT, WE SHOULD BE ON OUR WAY SATURDAY. I THINK WE DECIDED TO GO TO GRANDMA DEAN'S FOR AWHILE, PROBABLY JUST FOR A COUPLE OF DAYS AND THEN ON TO KEITH'S. IF I CAN GET MY LICENSE THE SAME DAY IN OKLAHOMA CITY, WE WON'T BE THERE VERY LONG."

PAGE 20 – PAGE 30: "BUT I THINK WE'LL END UP IN ONE OF THE WESTERN STATES BETWEEN HERE AND CALIFORNIA, NEVADA, UTAH. MAYBE WE CAN GET SOME MONEY TOGETHER."

DECEMBER 12TH, 1987, PAGE 31: "WE'VE ALL THREE BEEN HERE LAST NIGHT, AND RIGHT NOW THEY'VE GONE TO M-SYSTEM TO GET SANDWICHES AND STUFF AND SOME HAIR COLORING FOR KELLY AND I. THEY TALKED TO McBRIDE YESTERDAY. DON'T KNOW HOW [875] HE RECOGNIZED THEM, BUT HE TOLD THEM HE WAS LOOKING FOR ME. AND MIKE SAID I WAS IN OKLAHOMA; LAST TIME HE'D HEARD FROM ME, I WAS HEADED NORTH."

"I THINK" – AND THIS IS PAGE 32: "I THINK WE'RE GOING TO GET A TRUCK TONIGHT AND HEAD FOR SAN ANTONIO, HITCH RIDES THERE. WE SHOULD BE ABLE TO GO ALL THE WAY TO FLORIDA ONCE WE GET THERE . . . IF WE CAN GET THERE."

THE DIARY TELLS YOU HE WANTED OUT. HE WANTED TO GET OUT OF TOWN. HE PLANNED IT. THE PREPARATION WAS THERE. IT WAS ORGANIZED. HE TRIED TO LEAVE, DIDN'T HAVE ENOUGH MONEY; SO WHAT DOES HE DO? PLANS MR.

RICHARDSON'S DEATH TO GET WHAT MONEY HE'S GOT AND TO GET OUT OF TOWN.

DO YOU KNOW WHAT THE ANSWER IS TO SPECIAL ISSUE NUMBER 1? THE STATE WOULD SAY – IT WILL BE THE VERY FIRST ONE – "WE, THE JURY, UNANIMOUSLY FIND AND DETERMINE BEYOND A REASONABLE DOUBT THAT THE ANSWER TO THIS SPECIAL ISSUE IS, 'YES.'" IT'S CLEARLY THAT ON THE EVIDENCE, THE EVIDENCE THAT'S BEFORE YOU. THERE'S NO REASONABLE DOUBT. IT'S ALL THERE.

NOW, YOU'VE GOT A SECOND QUESTION TO ANSWER, AND WE TALKED ABOUT THIS BEFORE: "IS THERE A PROBABILITY THAT THE DEFENDANT, TED CALVIN COLE, WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?" AGAIN, LET'S LOOK AT THE EVIDENCE.

AGE OF SIXTEEN HE KILLED HIS BEST FRIEND, GARY DON [876] DEDEKER. FROM HIS CONFESSION HE SAYS HE TOOK HIS CAR AND RAN AFTER HE SHOT HIM.

SHERIFF HAYNES TESTIFIED THE GUNSHOT WAS TO HIS THROAT AND THAT HE LAID OUT THERE FOR FOUR TO FIVE DAYS BEFORE HE WAS DISCOVERED . . . WHERE HE FELL.

MICKEY ENGLERT TOLD YOU, NO PROVOCATION, NO PROMPTING OR QUESTION . . . HE TAKES THE DEFENDANT TO THE RESTROOM DURING THE TRIAL. THE DEFENDANT LOOKS BACK AT HIM AND SAYS, "YES, I KILLED HIM. I'D DO IT AGAIN."

KELLY HICKEY MADE THE REMARK, READING SOME TRANSCRIPT NOTES ABOUT THAT TRIAL – SAYS, "SOUNDS LIKE AN ACCIDENT," TO THE DEFENDANT; TO WHICH THE DEFENDANT RESPONDS, "THAT'S WHAT THE JURY WAS SUPPOSED TO THINK. I KILLED HIM TO SEE WHAT IT WAS LIKE TO KILL SOMEBODY." THAT SOMEBODY WAS HIS BEST FRIEND. IF YOU'LL LOOK AT THE PENITENTIARY PACKET, YOU'LL SEE THAT HE GOT A FIFTEEN-YEAR SENTENCE FOR THAT.

HE'S OUT OF THE PENITENTIARY; AND HE'S STAYING WITH A FRIEND OF THE FAMILY, SOMEONE WHO HAS BEFRIENDED HIM, MS. BURNES. SHE ALLOWED HIM TO LIVE IN HER HOME, WHERE HE ACTED TO MS. BURNS A PERFECT GENTLEMAN, IF YOU'LL REMEMBER HER WORDS; THAT HE TREATED HER WELL, TOOK CARE OF HER, AND HE ALSO TOOK CARE OF HER SON, BECAUSE DURING THAT TIME – AND YOU HEARD FROM THE YOUNG MAN, JOHN, WHAT WENT ON. HE SAW HIS BEST FRIEND IN A SEXUAL ACT – HIS FRIEND WAS TWELVE YEARS OLD – WITH THE DEFENDANT. AND THEN THE [877] SEXUAL ACTS WERE COMMITTED ON HIM – ORAL SEX ON HIM.

AND HE WAS ASKED TO DO THE SAME THING TO THE DEFENDANT IN THIS CASE, MR. COLE.

THE COURT: TEN MINUTES.

MR. SMITH: AND THE DEFENDANT ATTEMPTED ANAL INTERCOURSE.

AND CAPTAIN HAMBRICK WENT TO MAKE THE ARREST AND, WITH A SEARCH WARRANT, SEARCHES THE ROOM; AND HE FINDS ANOTHER DIARY THAT DESCRIBED THE DETAILS OF SEXUAL CONTACT BETWEEN HIM AND YOUNG BOYS, AND HE FINDS A WHOLE BUNCH OF NEWSPAPER ARTICLES. THOSE ARTICLES HAD TO DO WITH YOUNG MEN WHO WERE IN TROUBLE EITHER COMMITTING SEXUAL ACTS OR HAVING IT DONE TO THEM OR MURDERS DONE BY THEM OR MURDERS DONE TO THEM. YOU CAN LOOK AT THAT PEN PACKET, THE SECOND CONVICTION, AND YOU'LL SEE.

NOW, YOU'RE GOING TO LOOK AT THE DIARY AGAIN, AND THAT CONSIDERATION AGAIN COMES TO THE FUTURENESS HERE THAT YOU NEED TO ANSWER THAT QUESTION.

ON PAGE 12 OF THE DIARY THERE WAS AN – ON OCTOBER 25TH, '87: "MET A YOUNG, CUTE LITTLE TWELVE-YEAR-OLD NAMED 'CODY.' GOT TO HAVE HIM SOONER OR LATER. T.J. KNOWS A BUNCH OF THEM, AND THEY'RE ALL JAIL BAIT." HE KNEW IT WAS WRONG.

LATER ON, ON PAGE 14, HIS THOUGHTS – HIS INNERMOST ~~THOUGHTS~~: "I'M GOING TO FIGURE OUT HOW TO TAKE CODY WITH [878] ME. AND IF HE WON'T GO, I'M GOING TO AT LEAST HAVE HIM BEFORE I GO."

AND THEN ON PAGE 17: "I'M SICK AND TIRED OF THIS HUMDRUM EXISTENCE. I NEED SOME EXCITEMENT SO I CAN FEEL LIKE I'M ALIVE ONCE IN A WHILE. I WANT TO FIND SOMEONE YOUNG, ATTRACTIVE, AND WITH A SENSE OF ADVENTURE

WITH WHOM I CAN RUN AROUND THIS WORLD, SAILING THE SOUTH PACIFIC, THE CARIBBEAN, EXPLORING THE MEDITERRANEAN, PARTYING SOMEWHERE IN SOUTH AMERICAN JUNGLES, SMUGGLING, STEALING, ROBBING, RAPING, PILLAGING, MODERN-DAY VIKINGS OR PIRATE." YEAH, THIS – THIS IS WHAT HE IS. HE IS A PIRATE. HE TAKES AWAY FROM THOSE WHAT BELONGS TO SOMEONE ELSE. HE TOOK AWAY LIFE FROM TWO INDIVIDUALS. HE TOOK AWAY THE SEXUAL EXPERIENCE OF A YOUNG – TWO YOUNG MEN. HE TOOK PROPERTY THAT DIDN'T BELONG TO HIM, AND HE KILLED FOR THE PURPOSE OF TAKING THAT PROPERTY.

WHAT'S THE ANSWER TO SPECIAL ISSUE NUMBER 2? THE STATE WOULD SAY THAT THE EVIDENCE IS BEYOND A REASONABLE DOUBT THAT "WE, THE JURY, UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE ANSWER TO . . . SPECIAL ISSUE" – "THIS SPECIAL ISSUE IS 'YES,'" HE WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT CONSTITUTE A CONTINUING THREAT TO SOCIETY.

WHAT DID DR. WRIGHT TELL YOU? THAT THE BEST BAROMETER OF AN INDIVIDUAL'S FUTURE ACTS IS HIS PAST ACTS. [879] AND ALL THAT WE HAVE FROM AGE SIXTEEN NOW THROUGH AGE OF THIRTY-ONE ARE BAD ACTS . . . ONE AFTER ANOTHER.

I'M GOING TO SIT DOWN NOW, AND MR. SPENCE IS GOING TO HAVE A CHANCE TO TALK TO YOU, AND I'LL GET UP AGAIN AND TALK TO YOU ONE

MORE TIME. BUT I WANT YOU TO REMEMBER THOSE FACTS, AND I WANT YOU TO REMEMBER THAT EVIDENCE THAT WAS PRESENTED IN THIS CASE, AND YOU REMEMBER HOW THOSE QUESTIONS SHOULD BE ANSWERED. THANK YOU.

THE COURT: YOU MAY PROCEED.

MR. SPENCE: THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT . . .

LADIES AND GENTLEMEN:

THERE'S TED COLE. ON VOIR DIRE I INTRODUCED TED TO EACH ONE OF YOU. ALL WE'VE HEARD FROM THAT WITNESS STAND HAS BEEN STORIES ABOUT SOME – REALLY, SOME UNKNOWN INDIVIDUAL. HE'S NEVER BECOME A PERSON. BUT HE IS A PERSON. AND THAT'S WHAT WE'RE HERE FOR TODAY.

THERE'S TWO ISSUES. ONE IS WHETHER HE LIVES, AND THE OTHER IS WHETHER HE DIES. TO GET TO THAT, YOU HAVE TO ANSWER – ANSWER TWO SPECIAL ISSUES.

I CAN'T EXCUSE THE THINGS THAT HAVE HAPPENED IN THE PAST, AND I'M NOT GOING TO. I CAN'T CHANGE THAT.

YOU HEARD DR. DICKERSON SAY ABOUT THE PROBABILITY THAT – SPECIAL ISSUE NUMBER 2, THE PROBABILITY WHETHER OR NOT THERE'S GOING TO BE CONTINUING ACTS OF FUTURE DANGER [880] – OR, FUTURE DANGEROUSNESS. THAT INCLUDES A LESSER DEGREE OF PROBABILITY AS WELL AS MORE.

YOU ALSO HEARD DR. WRIGHT TESTIFY AS TO BURNOUT, WHAT HAPPENS WHEN A PERSON BECOMES FORTY, FIFTY, SIXTY YEARS OLD. THERE'S NO GUARANTEE OF THAT. BUT THERE'S NO GUARANTEE THAT ANYTHING ELSE WILL EVER HAPPEN. IT'S BEYOND A REASONABLE DOUBT THAT SOMETHING HAS TO HAPPEN AGAIN. I DON'T THINK ANY OF US HERE CAN SAY THAT IT WILL HAPPEN – ANYTHING WILL HAPPEN BEYOND A REASONABLE DOUBT AGAIN.

YOU HEARD NANCY HICKEY TESTIFY. TED WAS DESERTED WHEN HE WAS FIVE OR SIX YEARS OLD, PUT IN AN ORPHAN'S HOME. THERE ARE A LOT OF PEOPLE PUT IN ORPHAN'S HOMES. SOME OF THEM TURN OUT GOOD. SOME OF THEM TURN OUT BAD. AND I'M NOT EXCUSING – I'M NOT USING THAT FOR AN EXCUSE. THAT'S JUST A MITIGATING CIRCUMSTANCE. HE WAS SHUFFLED BACK AND FORTH TO HIS AUNT AND UNCLE'S IN OKLAHOMA. HIS MOTHER SAID THAT SHE SAW HIM TWO TIMES IN FIVE YEARS. I HAVE NO IDEA WHAT GOES ON IN TED'S MIND. NONE OF YOU DO. BUT HOW DID THAT CAUSE HIM TO BE AT THE POINT HE IS TODAY? IS THAT HIS FAULT? I DON'T KNOW.

DR. WRIGHT SAID THERE WAS SOMETHING WRONG WITH THE CENTRAL NERVOUS SYSTEM, ALL TESTS INDICATED THAT. MAYBE THAT CAUSED SOME OF IT. I DON'T KNOW.

WHEN TED GOT OUT OF THE ORPHAN'S HOME, HE CAME BACK [881] TO SAN ANGELO. HE HADN'T SEEN HIS FATHER IN ABOUT TEN YEARS. HIS

GRANDFATHER DIED, AND HE WENT TO THE FUNERAL. AND FROM THAT TIME AND POINT FORWARD, HE'S HAD NOTHING BUT PROBLEMS. HE WOULD GO TO LIVE WITH HIS FATHER AND HAVE PROBLEMS. HE'S BEEN REJECTED EVERYWHERE. THE ONLY PEACE HE EVER FINDS IS IN THE PENITENTIARY. AND THAT'S THE ONLY LIFE HE'S EVER KNOWN. HE DOESN'T KNOW HOW – HOW IT IS TO LIVE OUT HERE ON THE STREET. HE HASN'T HAD THE OPPORTUNITY. AND I'M NOT SAYING WE GIVE HIM THE OPPORTUNITY. I DON'T WANT TO GIVE HIM THE OPPORTUNITY. BUT ON THE OTHER HAND, IT'S NOT RIGHT TO KILL HIM JUST TO SHOW THAT KILLING IS WRONG. IT'S NOT.

THE RIGHT THING TO DO IN THIS IS TO ANSWER THOSE SPECIAL ISSUES IN SUCH A MANNER THAT HE BE SENT TO PRISON FOR LIFE.

THERE WAS A LOT OF DISCUSSION ON VOIR DIRE ABOUT THE DIFFERENCE BETWEEN "INTENTIONAL" AND "DELIBERATE."

I WANT YOU TO TAKE THIS DIARY AND READ IT AND GO THROUGH IT. THIS IS TED COLE'S LIFE. ONLY, IT'S A LIFE OF FANTASY. HE'S NEVER LIVED ANY OF THIS OUT. HE'S NEVER TRIED. HE WANTS TO DO THESE THINGS, BUT HE DOESN'T KNOW HOW. HE'S NEVER TRIED. THAT'S A HECK OF A LIFE.

LOOK AT – BACK TO THE TERM "DELIBERATE" AS OPPOSED TO "INTENTIONAL" . . . LOOK IN THAT DIARY ON THE 12TH OF DECEMBER. THERE IS ABSOLUTELY NO MENTION OF THEM WANTING [882] TO DO ANYTHING TO MR. RAYMOND RICHARDSON. THERE'S NO MENTION OF IT. WHY – IF HE'S SO

ALL-FIRED CONCERNED ABOUT KEEPING A DIARY, WHY IN THE WORLD WASN'T THERE SOMETHING IN THAT DIARY ABOUT THEM PLANNING TO KILL THE OLD MAN? THERE WASN'T. I THINK THAT'S AS GOOD AN INDICATOR AS THE DELIBERATENESS AS THERE IS. IT WASN'T PREMEDITATED. IT WASN'T THOUGHT OUT.

TED'S IN THE HABIT OF, EVERY TIME SOMETHING HAPPENS, HE GIVES A CONFESSION. HE WANTS TO GO AND SPILL HIS GUTS AND TELL EVERYBODY EVERYTHING. THAT WAY, HE DOESN'T HAVE ANY PROBLEMS WITH THE OFFICIALS OR THE LAW ENFORCEMENT PEOPLE. HE THINKS HE'S BEING GOOD DOING IT. HE WANTS TO TELL THEM WHAT THEY WANT TO HEAR.

THERE'S ONLY ONE QUESTION IN THIS TRIAL THIS AFTERNOON – IS WHETHER HE LIVES OR DIES.

YOU HEARD KELLY HICKEY TESTIFY. YOU HEARD WHAT SHE HAD PLEA BARGAINED WITH THE PROSECUTOR FOR, THIRTY YEARS. THINK ABOUT THIS. THAT WAS HER GRANDFATHER. TED WAS NO RELATION TO MR. RICHARDSON, BUT KELLY WAS. AND SHE IS JUST AS GUILTY AS TED IS. BUT SHE'S GOING TO THE PENITENTIARY FOR THIRTY YEARS. THE STATE IS ASKING YOU TO KILL TED. CAN YOU IN ALL GOOD CONSCIENCE DO THAT?

LOOK AT ALL THE EVIDENCE AGAIN. GO OVER THE DIARY. THINK ABOUT IT, READ IT, MULL OVER IT . . . AND DECIDE TED'S FATE. BUT BELIEVE IT OR NOT, HE IS A HUMAN BEING. IT'S [883] ONE THING

SITTING OVER HERE AND LISTENING TO WITNESSES TALK ABOUT SOMEONE, AND IT'S SOMETHING ELSE KNOWING THAT HE IS A MURDERER. CAN WE IN ALL GOOD CONSCIENCE SENTENCE HIM TO DEATH?

THANK YOU, LADIES AND GENTLEMEN.

THE COURT: YOU HAVE SIX MINUTES.

MR. SMITH: THANK YOU, YOUR HONOR.

YOU PROMISED THE STATE ON VOIR DIRE THAT YOU'D GIVE FAIR HEARING BOTH TO THE DEFENDANT AND TO THE STATE. YOU ALSO PROMISED THE STATE THAT, IF IT MET ITS BURDEN OF PROOF, YOU WOULD ANSWER THOSE QUESTIONS "YES," TO SPECIAL ISSUE NUMBER 1 AND 2. AND THE STATE SUBMITS THAT IT HAS MET THAT BURDEN. YOU ARE NOT KILLING MR. COLE IF YOU ANSWER THOSE QUESTIONS "YES."

MR. COLE IS HERE TODAY BECAUSE OF HIS OWN ACTIONS SINCE THE AGE OF SIXTEEN. AND HE HAS TO LIVE WITH THE CONSEQUENCES OF HIS OWN ACTIONS. HE'S HERE TODAY BECAUSE OF HIMSELF. AND HE'LL DIE BECAUSE OF HIS OWN ACTIONS IF YOU ANSWER THOSE QUESTIONS "YES." YOU'RE NOT KILLING HIM. HE'S DONE IT TO HIMSELF. SOCIETY HAS THE RIGHT TO PROTECT ITSELF. AND THIS IS A PRIME TIME TO DO IT.

MR. RICHARDSON WAS A PERSON, TOO. YOU HEARD MR. SPENCE TALK ABOUT THE DEFENDANT BEING A PERSON. WELL, YEAH, HE IS; BUT SO WAS MR. RICHARDSON. A FAMOUS AUTHOR ONCE SAID – THORNTON WILDER – THAT WE LIVE BY ACCIDENT

OR [884] WE DIE – AND WE DIE BY ACCIDENT, OR WE LIVE BY PLAN AND DIE BY PLAN. MR. RICHARDSON DIED BY PLAN. AND IT'S EVIDENT BY THE STATEMENTS AND THE EVIDENCE FROM THE STAND, FROM THE CONFESSION THAT YOU'VE READ, AND BY TED CALVIN COLE'S OWN PERSONAL THOUGHTS, HIS OWN PLANS. IT'S HIS PLANS THAT MR. RICHARDSON DIED. HE WAS DELIBERATELY KILLED. HE KNEW WHAT HE WAS DOING TO HIM. THERE WAS A REASON AND A PURPOSE FOR IT, SOLELY AS A MODERN-DAY PIRATE, SO THAT HE COULD TAKE AWAY THAT INDIVIDUAL'S LIFE AND HE COULD TAKE AWAY SOME MONEY SO HE COULD GO ABOUT HIS OWN SELF-SATISFACTION AND GRATIFICATION.

DR. COONS GOT ON THE STAND AND TESTIFIED, AND HE TOLD YOU WHAT THOSE STATEMENTS WAS. FILL IN THE BLANK. ANSWER AN INCOMPLETE SENTENCE. GAVE IT TO THE DEFENDANT. "I REGRET" BLANK; TO WHICH THIS DEFENDANT SAID, "NOTHING," EXCLAMATION MARK.

HE KILLED THE OLD MAN BECAUSE HE WAS OLD, SAT AROUND MOST OF THE TIME ANYWAY AND DRANK VODKA. THAT WAS MR. RICHARDSON'S LIFE TO LIVE AS HE SAW FIT; NOT FOR THIS MAN TO ACT AS GOD AND EXECUTIONER AND TAKE IT FROM HIM.

HE REGRETS NOTHING. HE DID LIVE OUT THE FANTASY IN THAT BOOK. HE DID BECOME THAT MODERN-DAY PIRATE BY STEALING THE MAN'S MONEY, BY STEALING HIS LIFE FROM HIM.

HE WROTE THIS BOOK WHEN HE WASN'T IN PRISON, WHEN HE WAS FREE. HE WROTE THOSE

THOUGHTS DOWN WHEN NO ONE ELSE [885] WAS CONTROLLING HIM. HE DID LIVE OUT THAT FANTASY. THEN IT STOPS ON PAGE 32. IF YOU'LL LOOK AT THAT DIARY, IT GOES TO A HUNDRED – HE'S ALREADY NUMBERED THE BOOK TO PAGE 141. AND WHAT ELSE WOULD BE – WOULD BE THERE?

IT DOESN'T LESSEN THE CRIME THAT HE WASN'T COMMITTED [SIC] TO MR. RICHARDSON. AND WE'RE NOT SAYING KELLY HICKEY IS A NICE YOUNG LADY, BECAUSE SHE'S NOT. TED CALVIN COLE PLANNED THIS, AND YOU CAN SEE IT IN HIS WRITINGS, AND YOU CAN SEE IT BY WHAT HE SAID. HE DID IT. AND YOU CAN SEE FROM THE EVIDENCE OF HIS PAST OFFENSES FROM THE AGE OF SIXTEEN WHERE HE'S ROBBED TWO PEOPLE OF THEIR LIVES, A YOUNG MAN AND AN OLD MAN; STOLE THE YOUNG MAN'S CAR, RAN IN HIS FANTASY TO GO TO DALLAS. AND THEN HE COMMITTED THESE SEXUAL FANTASY CRIMES AGAINST TWO YOUNG MEN, AN EIGHT-YEAR-OLD AND A TWELVE-YEAR-OLD.

FUTURE DANGEROUSNESS? YES. SOCIETY HAS A RIGHT TO PROTECT ITSELF. AND THE TIME IS NOW FOR YOU TO DO YOUR DUTY; AND THAT DUTY IS TO ADMIT THE STATE HAS MET ITS BURDEN OF PROOF IN THIS CASE AND TO ANSWER SPECIAL ISSUE NUMBER 1, "YES," AND SPECIAL ISSUE NUMBER 2, "YES." THAT'S WHAT THE EVIDENCE POINTS TO BEYOND A REASONABLE DOUBT, WHAT YOU HEARD ON THIS STAND, WHAT YOU WILL SEE – WHAT YOU SEE IN THE PAPERWORK. THE TIME HAS COME TO ACT, AND THE TIME IS TO ANSWER – PLEASE, THIS IS A SERIOUS THING, AND I'M NOT

GOING TO MAKE LIGHT OF IT. IT'S A TIME [886] FOR YOU TO CONSIDER IT ALL AND MAKE THAT DECISION AND ANSWER THOSE QUESTIONS CORRECTLY. BUT THE STATE SUGGESTS – STRONGLY URGES AND POINTS TO THE EVIDENCE . . . THE ANSWER IS "YES" TO BOTH THOSE SPECIAL ISSUES.

REMEMBER, YOU'RE NOT KILLING MR. COLE. HE'S DONE IT TO HIMSELF.

THANK YOU.

* * *

NO. CR88-0043-A
WRIT NO. 1

IN THE DISTRICT COURT OF
TOM GREEN COUNTY, TEXAS
51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

ORDER OF TRIAL COURT RECOMMENDING DENIAL OF DEFENDANT'S APPLICATION NO. #1 FOR POST CONVICTION WRIT OF HABEAS CORPUS
CAPITAL PENALTY CASE

1. *FACTS RE CONVICTION BEING CHALLENGED*: IN Cause No. CR88-0043-A, the petitioner, TED CALVIN COLE was charged by an indictment with the offense of CAPITAL MURDER. On June 4, 1988, petitioner was convicted and based upon the jury's answers to the special issues was sentenced to death. On July 1, 1988 a motion for new trial was filed by the petitioner. On July 31, 1998, a hearing was held on the motion for new trial and after hearing the motion was denied.

2. *APPELLATE HISTORY OF CONVICTION BEING CHALLENGED*: Appeal was automatic and the appeal was docketed by the Court of Criminal Appeals as CCRA No. 70,401. The sole issue raised on appeal was that the evidence was insufficient to support the jury's guilty verdict. On September 26, 1990, the Court of Criminal Appeals issued its opinion affirming the trial court. On October 2, 1990, an application for re-hearing was filed. On November 14, 1990, the Court of Criminal Appeals denied the application for re-hearing. On November 30, 1990, the Court of Criminal Appeals issued the mandate in

the case which was received by the District Clerk on January 12, 1991.

3. *OTHER SIGNIFICANT DATES*:

On January 24, 1991, the District Court signed an order setting a hearing for February 8, 1991 to set an execution date in accordance with Code of Criminal Procedure 43.14 as then in effect. Petitioner was bench warranted to Tom Green County for the February 8, 1991 hearing. An execution date of March 22, 1991 was set.

On March 18, 1991, the Court of Criminal Appeals denied a Motion to Recall Mandate and Stay Execution pending application for writ of certiorari in the Supreme Court of the United States. On that same date, Justice Scalia granted a stay of execution pending disposition by the Supreme Court of the Petition for Writ of Certiorari. On April 22, 1991, the Supreme Court of the United States denied the Petition for Writ of Certiorari.

On July 8, 1991, the District Court again signed an order setting a hearing to set an execution date. The petitioner was again bench warranted to Tom Green County for the hearing which was held on August 13, 1991. A new execution date of September 20, 1991 was set.

On September 10, 1991, petitioner, by his counsel, Carlton McLarty, filed an Emergency Application for Stay or Modification of Execution Date to Permit Filing of Petition for Writ of Habeas Corpus. On that same date, the District Court granted the Emergency Application for Stay. The order granting the stay of execution provided that the Petition for Writ of Habeas Corpus be filed by January 8, 1992 and set a date for hearing on the petition for January 28, 1992.

On January 8, 1992, pursuant to a verbal request by counsel for the petitioner, modified its order granting the emergency stay to allow until March 2, 1992 to file a Petition for Writ of Habeas Corpus and re-setting an evidentiary hearing on the writ, if filed, for March 30, 1992.

On March 2, 1992, Carlton McLarty, as counsel for petitioner, filed the Petition for Writ of Habeas Corpus with the District Court.

On March 20, 1992, the District Court considered a Motion for Continuance and Re-setting of Evidentiary Hearing filed by the petitioner's counsel. The motion was granted and the hearing was re-set for June 29, 1992.

On June 12, 1992, petitioner's counsel filed another Motion for Continuance and Re-setting of Evidentiary Hearing. The primary basis for this motion was the granting of certiorari by the Supreme Court of the United States in *Graham v. Collins,* 950 Fed. 2d 1002 (5th Cir. 1992). The petitioner had relied heavily upon Graham v. Collins in his application and requested in the motion for continuance that all further action in petitioner's case be postponed until the Supreme Court of the United States resolves the issues presented by the *Graham* certiorari petition. The District Court granted the motion for continuance and in accordance with petitioner's request continued all proceedings until further order to allow the Supreme Court to rule in *Graham.*

By letter of June 27, 1993, the District Court was advised by counsel for petitioner that counsel was closing his private practice and was seeking substitute counsel for petitioner. Based upon this letter that counsel for petitioner was seeking substitute counsel, the District Court

continued to hold the proceedings on the petition in abatement.

On January 25, 1993, the Supreme Court issued its opinion in Graham v. Collins, 113 S.Ct. 892. Since the basis for the abatement was awaiting the ruling of the Supreme Court in this case, the District Court expected to hear from either counsel for the petitioner or from the District Attorney that they were ready to proceed with the hearing on the petition. The court received no request to proceed.

On August 31, 1995, Carlton McLarty filed a Motion to Withdraw as Attorney of Record and Appoint Substitute Counsel. The motion requested the District Court to appoint counsel under the provisions of Article 26.05, Code of Criminal Procedure and suggested that such appointed counsel could then petition the Court of Criminal Appeals pursuant to Article 11.071(i) for appointment pursuant to " . . . rules expected to be adopted by the Court of Criminal Appeals. Said rules have not yet been promulgated by the Court of Criminal Appeals, pending recommendations of a panel. . . . " Since the motion was suggesting action based upon rules that had yet to be promulgated, the District Court took no action.

On May 16, 1997, counsel for petitioner filed a Second Motion to Withdraw as Attorney of Record and Appoint Substitute Counsel. On September 15, 1997, petitioner wrote the Judge of the District Court handling the petition. Petitioner's letter advised the Judge that petitioner desired and intended to drop his appeal (presumably the Petition for Writ of Habeas Corpus) and asked that an execution date be set. This correspondence appeared to be at odds with the Second Motion to Withdraw as Attorney

of Record and Appoint Substitute Counsel filed by Carlton McLarty, as there would be no purpose in appointing substitute counsel if petitioner were to abandon his petition for writ of habeas corpus.

On July 15, 1998, Carlton McLarty, filed a Third Motion to Withdraw as Attorney of Record and Appoint Substitute Counsel. Attached to this motion, for the first time, was a Declaration of Defendant signed by petitioner. This Declaration of Defendant states that the petitioner desires the appointment of counsel for the purpose of a writ of habeas corpus. This declaration is in conflict with petitioner's earlier letter to the Judge that petitioner desired to drop his appeal. Based upon these conflicting filings by petitioner and Carlton McLarty, the District Court entered an order allowing Carlton McLarty to withdraw and set a hearing to determine the actual desire of petitioner, being whether petitioner desires to pursue the petition or desires to abandon and withdraw the petition. The District Court had petitioner bench warranted to the hearing.

At the hearing on September 4, 1998, the petitioner advised the District Court that he wished to proceed with the Application for Writ of Habeas Corpus and desired to have the Court of Criminal Appeals appoint counsel on the Application.

On September 29, 1998, the District Court sent the Court of Criminal Appeals a certified copy of its findings under Sec 2(i) of Article 11.071, Texas Code of Criminal Procedure. As of this date the District Court has not been made aware of any attorney having been appointed to represent petitioner on the Application.

4. *PRESENT APPLICATION FOR WRIT*: On March 2, 1992, petitioner filed this application for writ of habeas

corpus. In this application petitioner raises twenty-one points, to wit:

I. The jury heard significant mitigating evidence which it could neither consider nor give effect under the unconstitutionally preclusive Texas sentencing statute, rendering the sentencing determination in his case unreliable, citing Penry v. Lynaugh, 492 U.S. 302, 106 L.Ed.2d 256 (1989).

II. An Estelle v. Smith, 451 U.S. 454 (1981) issue that petitioner's sixth amendment right to counsel was violated when Dr. Robert Coons, a Court appointed psychiatrist, questioned petitioner regarding future danger issues without informing petitioner's trial counsel, Robert Spence, of his intent to do so.

III. A claim that petitioner's appellate counsel, Ancial Middlebrook, provided ineffective counsel on appeal.

IV. A claim that petitioner's rights under Article 14.01, 14.02, 14.03, 14.04 and 38.23 of the Code of Criminal Procedure were violated by petitioner's warrantless arrest.

V. A claim that the trial court improperly admitted petitioner's first statement gained as a result of a warrantless arrest.

VI. A claim that the petitioner's second statement was the product of state coercion.

VII. A claim that the trial court denied petitioner his rights to due process of law, a reliable determination of guilt and sentence, and a fundamentally fair trial by failing to define "reasonable doubt."

VIII. A claim that the special issues result in the arbitrary and capricious imposition of the death penalty.

IX. A claim that Texas law allowing instructions on parole implications in a non-capital offense but not in a capital offense results in a denial of equal protection.

X. A claim that the trial court failed to instruct the jury about parole law and the meaning of a life sentence in a capital case.

XI. A claim that the statute forbade a single juror to give mitigating effect to his desire to return a life sentence by requiring ten votes to return a "No" finding to the special issues.

XII. A claim that the admission of unadjudicated extraneous offenses at the punishment phase deprived petitioner of his Eighth and Fourteenth protections.

XIII. A claim that the trial court failed to instruct the jury that it could consider evidence of prior unadjudicated acts at the sentencing phase only if it believed beyond a reasonable doubt that petitioner committed those acts.

XIV. A claim that petitioner was denied equal protection when the trial court

admitted and jury considered allegations of prior unadjudicated offenses during the punishment phase.

XV. A claim that the jury charge relieved the prosecution of its obligation to prove every element beyond a reasonable doubt.

XVI. A claim that the trial court's charge on punishment failed to instruct the jury to consider mitigating evidence in determining the appropriate punishment.

XVII. A claim that the prosecutors engaged in repeated and continuing misconduct.

XVIII. A claim that the state presented impermissibly inflammatory and prejudicial evidence and argument concerning the character and worth of the deceased.

XIX. A claim that the state improperly presented highly prejudicial photographs as victim impact evidence.

XX. A claim that the trial court erred by requiring prospective jurors to take an oath that the death penalty would not affect their deliberations.

XXI. A claim that the trial court prevented petitioner from presenting mitigating evidence concerning his prior conviction.

5. *DISCUSSION OF PETITIONER'S CONTENTIONS*:

I.

PENDRY [sic] CLAIM

The first claim for relief addressed by petitioner is that his mitigating evidence was not able to be properly considered and given effect by the jury under the special issues presented. The mitigating evidence raised by petitioner was as follows:

1. That petitioner's mother was an alcoholic and unable to care for her children. (Vol. XVII, p. 772)

2. That petitioner's father was arrested for robbing a liquor store. (Vol. XVII, p. 770)

3. That petitioner's father deserted the family before petitioner was five years old. (Vol. XVII, p. 771)

4. That petitioner's family went to live with petitioner's maternal grandparents, who were alcoholics, and who did not want them to live with them. (Vol. XVII, p. 771)

5. That petitioner's maternal grandparents home was eight miles out of town and petitioner was completely isolated from other children. (Vol. XVII, p. 771)

6. That school buses did not run to petitioner's maternal grandparents home and that the grandparents would not allow petitioner's mother to use their car to take petitioner to school. (Vol. XVII, p. 771).

7. That petitioner was placed in an orphanage at five years of age. The record actually reflects that petitioner was placed in a Church of Christ Children's Home where the child must be sponsored. Petitioner's sponsor was his

uncle who was an elder in the Church of Christ. (Vol. XVII, p. 771-774) The record would reflect there being a difference between an orphanage (as alleged by petitioner in the application) and the Children's Home as testified to in the record.

8. That during the five years in the Children's Home (referred to by petitioner in application as an orphanage), petitioner's mother visited only twice. (Vol. XVII, p. 772-773)

9. That when petitioner visited his family at holidays while living in the Children's Home, petitioner seemed incapable of expressing his feelings. (Vol. XVII, p. 790)

10. That petitioner's father never visited him. (Vol. XVII, p. 790)

11. That petitioner moved to San Angelo with his mother and step-father at age eleven, attended school and made good grades. (Vol. XVII, p. 775)

12. That no doubt fearing a return trip to the "orphanage", petitioner was on his best behavior. (Vol. XVII, p. 776)

13. That petitioner tried to be "a perfect child." (Vol. XVII, p. 776)

14. Dr. Jarvis Wright testified that petitioner lacked a great deal of impulse control . . . it indicates some central nervous system damage or very likely central nervous damage. (Vol. XVII, p. 808)

15. Dr. Jarvis Wright testified that the combination of petitioner's impoverished childhood and his neurological

dysfunction have impaired petitioner's judgment and ability to plan ahead. (Vol. XVII, p. 809)

16. Dr. Jarvis Wright testified that "together to make it to where he very often can't behave in another way." (Vol. XVII, p. 809)

17. Dr. Jarvis Wright testified the petitioner lives most of his life in fantasy; that fantasy is the only way he knows how to cope with reality. (Vol. XVII, p. 811)

18. Dr. Jarvis Wright described petitioner's childhood as rugged and rough. (Vol. XVII, p. 806)

19. Dr. Jarvis Wright explained that petitioner had few memories of childhood. (Vol. XVII, p. 807)

20. Dr. Jarvis Wright testified that petitioner's early life experiences were so painful that petitioner erased most mental images from his conscience. (Vol. XVII, p. 807)

21. Dr. Jarvis Wright testified that petitioner's personality is fragmented, and that the reasons and motives behind his behavior are not accessible to petitioner. (Vol. XVII, p. 807)

The issue is whether the sentencing jury had been unable to give effect to petitioner's mitigating evidence within the confines of the statutory "special issues." While *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989) held that evidence of a defendant's mental retardation and abused childhood could not be given mitigating effect by a jury within the framework of the special issues, the cases that followed such as *Graham v. Collins,* 113 S. Ct. 892 (1993), *Garcia v. State,* 919 S.W.2d 370 (1996), *Mines v. State,* 888 S.W.2d 816 (1994),

and *Zimmerman v. State,* 881 S.W.2d 360 (1994) held that the mitigating evidence of alcoholism, drug abuse, bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse were sufficiently considered under the special issues. The issue of whether the mitigating evidence can be sufficiently considered must be determined on a case by case basis, depending on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given.

The expert testimony of two of petitioner's witnesses provide a basis for the jury to have given consideration to the type of mitigating testimony offered by the petitioner. Dr. Jarvis Wright testified as follows:

1. "I think the research certainly indicates that individuals like Ted, individuals who have had this kind of background, tend to begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a bit and change a good bit. You can infer that from some of the FBI crime statistics on age and changes in persons." (Vol. XVII, p. 807)

2. "But I think as we see him age, get older, hormones change, the process of aging takes over, as it does in all of us – and we all change. I think the evidence is overwhelming there that individuals who have behaved as he has change. They burn out. And I think there's a good chance of later in life – not now, but later in life – some changes". (Vol. XVII, p. 813)

3. "We're talking about central nervous system dysfunction. I don't know whether there's damage or not." (Vol. XVII, p. 816)

4. "I'm suggesting that, as we grow older, we change; the compass points a different direction. We're tried [sic].

> We're – we're – our goals, our orientation is different. The research indicates that – that this is the case with individuals who commit violent or antisocial acts." (Vol. XVII, p. 817)

Another defense expert, Wendel L. Dickerson, PhD., the former chief mental health officer for the Texas Department of Corrections, testified as follows:

1. " . . . on the basis of the statistical data available to use, that diagnosis would necessarily apply five, ten, fifteen years from now. I mean, whatever condition he is suffering from is not necessarily immutable and unchangeable. I mean, it can be changed – I mean, time changes – I mean – and experience changes people. Changes in body change people." (Vol. XVII, p. 840)

2. "Old person gets older. Their hormones change. The brain changes. So it's – I mean, just because he's dangerous – if he's dangerous today, does not necessarily mean he's going to be dangerous at some future point in time." (Vol. XVII, p. 840)

The evidence presented at the punishment stage of the trial, especially evidence from the petitioner's expert witnesses, provide a basis for the jury to sufficiently consider the mitigating evidence offered by the petitioner.

There are no controverted, previously unresolved factual issues regarding petitioner's *Pendry* [sic] claim.

II.
ESTELLE CLAIM

Petitioner claims of an *Estelle v. Smith,* 451 U.S. 454 (1981) violation. He complains primarily that his sixth amendment right to counsel was violated when Dr. Robert

Coons, a Court appointed psychiatrist, questioned him regard future danger issues without informing his trial counsel, Robert Spence, of his intent to do so. Since trial counsel died in an automobile accident, there is no purpose to be served by having an evidentiary hearing on whether Mr. Spence was informed of Dr. Coons intent to question petitioner on this issue. Petitioner goes on to claim that this information was used against him at trial.

Assuming for the purpose of this analysis that the portion of the interview by Dr. Coons which dealt with future danger issues was in violation of petitioner's sixth amendment right to counsel, petitioner fails to demonstrate how this interview harmed him. *Estelle* and Sixth Amendment violations in this area are subject to a harm analysis. *Satterwhite v. State,* 108 S.Ct. 1792 (1988); *Wilkens v. State,* 847 S.W.2d 547 (1992).

Estelle error was held harmless in *ExParte Barber,* 879 S.W. 2d 889 (1994). *Barber's* case is very similar to petitioner's on this issue. Like *Barber,* petitioner had previously been convicted of murder. (Vol. XVII, Exhibit 36). Additionally petitioner was convicted of Aggravated Sexual Assault on two pre-teen boy. (Vol. XVII, Exhibit 37).

Dr. Coons testimony on danger issues based upon information obtain by Dr. Coons interview was as follows:

1. "Mr. Cole has a number of sociopathic antisocial personality features to his personality." (Vol. XVII, p. 758).

2. "Well, the history of – that he gave me about his deliberation about this offense that he was doing, this willingness to take the life of another person for financial

gain; the – his prior criminal history, which – which he described to me; his – his feelings and attitude about having committed this offense, in terms of indicating that it did not bother him that he had killed this older man and his rationale for why it didn't bother him, that he was old and all he did was sit around the house and drink vodka, and half the time he didn't know where he was; and the only thing about this that bothers me is getting caught. Those are features of a person with – who has serious conscience defects which you see in sociopathic or antisocial personalities, the lack of remorse for things, the lack of conscience about them" (Vol. XVII, p. 759).

3. "Kind of classic thinking about the sociopathic personality is the – is that they have – that they – do acts against society and that they don't profit from their experiences. They don't learn from experience. They just keep on doing these things because they want to. They don't feel remorseful or guilty about what they've done. It's a – it's a personality pattern, as opposed to just a short-term problem. It's a feature of their personality." (Vol. XVII, p. 767).

Petitioner's own expert witnesses concurred that petitioner was a man who showed a probability for future violence. Dr. Jarvis Wright, a defense expert, testified as follows:

1. "I think if Ted were released today on the street, there's a much greater probability of dangerous behavior than with the rest of us. We can only talk about probabilities. We can't talk in certainties because we don't have crystal balls. But I think there's a probability that all of us are likely to engage in dangerous behavior or in violent behavior. It's not going to be the same for all of us. I think for Ted it's going to be much greater than for most individuals right now. So I think there's a possibility of future violence. I

don't think there's any way we – I think we'd be foolish to say otherwise. I think we're looking at years from now." (Vol. XVII, p. 812-813).

2. Question: "Given the defendant's background, do you think it's more probable that he would commit those acts?"

   Answer: "Absolutely." (Vol. XVII, p. 818-819).

3. Question: " – Do you feel he's a dangerous person?"

   Answer: "Yes."

   Question: "Okay. And isn't it a fact that there's a probability that he would commit criminal acts of violence that would constitute a continuing threat to society in the future?"

   Answer: "I think that probability is stronger than for the rest of us, yes."

4. "Ted has a greater probability than the rest of us of doing something violent if he's turned loose right now." (Vol. XVII, p. 821).

5. Question: "And it's very probable that if a person has committed two murders and sexually abused children, that he's going to – it's probable that he's going to continue doing that; isn't that correct, Sir? There's a greater probability that he's going to continue that; is that correct?"

   Answer: "He would – yes, there would be a greater probability. Not a very probable, but there would be a – there would be a greater likeliness than with those of us in the normal population" (Vol. XVII, p. 823).

Another defense expert, Wendel L. Dickerson, PhD., the former chief mental health officer for the Texas Department of Corrections, testified as follows:

Question: "Now, the evidence that you know about Mr. Cole from Jarvis Wright – Dr. Wright's tests, would that support the diagnosis of Ted being a psychopath or a sociopath?

> Answer: "It could well be consistent with – with that. It's also consistent with several other possibilities. One is the possibility of an attributive sociative reaction in which the individual is simply blocking a lot – a lot – I mean, it's almost a multiple personality kind of thing where – I mean, you get him acting one way during one period of time and then a 180 degrees different another period of time." (Vol. XVII, p. 842).

In reviewing the harm of Dr. Coons' testimony, the State mentioned Dr. Coons only once during closing argument. Dr. Coons' testimony on future danger issues was not the only testimony about future danger. The petitioner's own expert witnesses testified at length about the probability that petitioner would be a danger to society. The complained about testimony of Dr. Coons' was clearly harmless and did not contribute to the verdict obtained.

III.
INEFFECTIVE ASSISTANCE ON APPEAL CLAIM

Petitioner argues that his appellate attorney, Ancial Middlebrook, provided ineffective assistance. In order to sustain this point, petitioner must show: (1) Middlebrook's representation was not reasonable [sic] effective, and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have [sic] different. *Moore v. State*, 700 S.W. 2d 193 (Tex. Crim. App.), and *Strickland v. Washington*, 466 U.S. 668 (1984).

Middlebrook's representation on appeal was not reasonably effective and the first prong of the Strickland test is satisfied. However, petitioner cannot demonstrate a reasonable probably [sic] that but for the errors, the appeal would have turned out differently.

The first appeal point that petitioner points out should have been raised is the trial court's failure to instruct the jury on mitigating evidence as contemplated by the *Pendry* decision. Applicant is correct that appeal point should have been raised. However, all cases dealing with the type of mitigating evidence presented by petitioner have held that the first two special issues under the old law were sufficient and denied relief. The discussion of the *Pendry* Claim above demonstrates that there would have been no different appellate result had the point been raised.

The second appeal point that petitioner points out should have been raised is the issue of the warrantless arrest and the admission of evidence thus obtained, included petitioner's two statements. The trial court conducted a hearing on the arrest and confession on June 2, 1988. (Vol. XIV, p. 42-176). The trial court found the arrest without warrant valid pursuant to Code of Criminal Procedure Articles 14.03 (A)(1) and (A)(2), as well as Article 14.04. (Vol. XIV, p. 173-176). The Court further found the December 14th confession and a later December 28th confession to be voluntarily given and counsel voluntarily waived. (Vol. XIV, p. 173-176).

The trial judge's findings in a *Jackson v. Denno,* 378 U.S. 368 (1964) hearing will not be disturbed on appeal absent an abuse of discretion demonstrated from the

record of the hearing. *Sherman v. State,* 532 S.W. 2d 634 (Tex. Crim. App. 1976).

Petitioner recounts the testimony on the arrest circumstances and the taking of each of petitioner's two statements. Although the testimony of Cole and the police officers conflicts, the trial judge is the sole judge of the credibility of the witnesses in a suppression hearing. Petitioner fails to point out how the trial judge abused his discretion in making this findings. Considering the high standard on direct appeal, abuse of discretion, petitioner has not met the second prong of *Strickland* in showing specifically how the trial court abused its discretion. Therefore, petitioner cannot show how raising this point on appeal would have changed the result of the appeal.

The third appeal point that petitioner points out should have been raised is the issue of sufficiency of evidence on the future danger issue. As the discussion on the *Estelle* Claim above shows, there was evidence showing petitioner had previously killed another person and had sexually assaulted two pre-teen boys. Even without consideration of the testimony of Dr. Coons, petitioner's own experts testified that petitioner was in fact a person who would probably commit future acts of violence. There is no probability that raising this point on appeal would have changed the result of the appeal.

Since the record is sufficient to determine that Mr. Middlebrook's representation on appeal fell below the first prong of Strickland, there is no need for an evidentiary hearing on this point. The second prong can be evaluated from the trial record itself (as an appeal would have been).

IV.
WARRANTLESS ARREST CLAIM

The discussion of the ineffective assistance on appeal portion above adequately covers this point. No evidentiary hearing is needed.

V.
FIRST CONFESSION CLAIM

The discussion of the ineffective assistance on appeal portion above adequately covers this point. No evidentiary hearing is needed.

VI.
SECOND CONFESSION CLAIM

The discussion of the ineffective assistance on appeal portion above adequately covers this point. No evidentiary hearing is needed.

VII.
DEFINITION OF REASONABLE DOUBT (GEESA) CLAIM

Petitioner asserts that he was denied his rights to due process of law, a reliable determination of guilt and sentence, and a fundamentally fair trial, by the trial court failing to define the term "reasonable doubt" in its charge at both phases of the trial. At the time of trial there was no approved definition of "reasonable doubt" in Texas courts. Geesa v. State, 820 S.W. 2d 154 (Tex. Crim. App. 1991) is not retroactive in its application. No evidentiary hearing is needed.

VIII.
SPECIAL ISSUES RESULTING IN THE ARBITRARY AND CAPRICIOUS, IMPOSITION OF THE DEATH PENALTY CLAIM

Petitioner asserts that the special issues fail to distinguish who will receive the death penalty and who will not, that the special issues are unconstitutionally vague. The claim is the the [sic] result of the special issues is the arbitrary and capricious imposition of the death penalty. No case has ever held this to be true of the Texas death penalty sentencing procedure. No evidentiary hearing is needed.

IX AND X
CLAIM FROM LACK OF PAROLE INSTRUCTIONS AND LACK OF INSTRUCTION ON MEANING OF LIFE SENTENCE

In his IX. point, petitioner asserts that he was denied equal protection of the law by the trial court not instructing the jury on petitioner's eligibility for parole and certain calculations relevant to parole guidelines. The claim is based upon the court's making certain statutory instructions on parole and good time on non-capital offense and the law not providing for similar instructions in a capital case.

In his X. point, petitioner asserts that he was denied his rights under the Eighth Amendment by the trial court not instructing the jury about Texas parole law and the meaning of a life sentence in a death penalty case.

All Texas cases on this issue have held against petitioner's position. *Elliott v. State,* 858 S.W. 2d 478 (1993); *Garcia v. State,* 887 S.W. 2d 846 (1994); *Smith v. State,* 898 S.W. 2d 838 (1995). No evidentiary hearing is needed.

XI
CLAIM THAT TEN VOTES REQUIRED TO RETURN TO NO VOTE FORBIDS A SINGLE JUROR FROM GIVING MITIGATING EFFECT

Petitioner claims that the standard jury instruction requiring ten votes for a "No" answer to a special issue instruction, has the effect of forbidding a single juror from giving mitigating effect to his desire to return a life sentence. Petitioner's position is that this instruction conflicts with the Eighth Amendment requirement that each juror must be allowed to consider and give effect to his conclusion that the evidence does not warrant a sentence of death. This instruction has been uniformly upheld. *Green v. State,* 912 S.W. 2d 189 (1995); *Moreno v. State,* 858 S.W. 2d 453 (1993); *Chambers v. State,* 903 S.W. 2d 21 (1995); *Brigman v. State,* 918 S.W. 2d 466 (1996). No evidentiary hearing is needed.

XII, XIII and XIV
CLAIM THAT THE ADMISSION OF UNADJUDICATED OFFENSES AND THE FAILURE OF THE TRIAL COURT TO INSTRUCT THAT UNADJUDICATED OFFENSE COULD BE CONSIDERED ONLY IF THE JURY FOUND BEYOND A REASONABLE DOUBT THAT THEY WERE COMMITTED

Petitioner in his points XII, XIII and XIV complains of the admission of unadjudicated conduct or bad acts at the penalty phase of his trial. He also complains of the Court's failure to instruct the jury that they could only consider the unadjudicated conduct or acts if they found beyond a reasonable doubt that they were true.

Coble v. State, 871 S.W. 2d 192 (1993) ruled against petitioner's position on a reasonable doubt instruction on unadjudicated conduct. A defendant in a capital case is not entitled to such an instruction.

Gentry v. State, 770 S.W. 2d 780 (1988) held extraneous, unadjudicated offenses are admissible at punishment. Also, Article 37.07(a) of the Texas Code of Criminal Procedure expressly provides for presentation of any matter the court deems relevant to sentence. Although unfair surprise can cause a due process violation, nothing in the record indicates that petitioner was surprised by any matter presented.

Any possible error is harmless due to the overwhelming weight of a prior murder conviction and two aggravated sexual assault convictions. No evidentiary hearing is needed.

XV
CLAIM THAT THE JURY CHARGE AT THE GUILT PHASE RELIEVED THE PROSECUTION OF ITS OBLIGATION TO PROVE EVERY ELEMENT BEYOND A REASONABLE DOUBT

Capital murder requires the State to prove that the defendant possessed a specific intent to kill. Petitioner bases this claim on a portion of the charge that provides as follows:

> "A person acts intentionally, or with intent with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result"

Petitioner claims that this language relieved the prosecution from proving beyond a reasonable doubt that

petitioner had a specific intent to kill the deceased. Petitioner claims that the charge would allow a jury to convict based solely on a finding that petitioner intentionally engaged in the conduct that caused the death – that is, that petitioner intentionally choked the deceased.

In considering this point, the entire charge must be considered, especially the application paragraph. That paragraph continued the following instruction:

> "Before you would be warranted in convicting the defendant of capital murder, you must find from the evidence beyond a reasonable doubt not only that on the occasion in question that defendant was engaged in the commission or attempted commission of the felony offense of robbery of Raymond C. Richardson, as defined in this charge, but also that during the commission of the robbery or attempted commission thereof, if any, beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Raymond C. Richardson, when he strangled him, if he strangled him. . . ." (Vol. I, p. 163-171)

The complained of language is appropriate for some of the conduct which must be proved, such as the commission or attempted commission of the felony offense of robbery. The specific instruction that the jury must find " . . . beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Raymond C. Richardson, when he strangled him, if he strangled him . . . " properly informed the jury of the specific intent, result oriented requirement of capital murder. *Cook v. State,* 884 S.W. 2d 485 (1994); *Hernandez v. State,* 819 S.W. 2d 806 (1991). No evidentiary hearing is needed.

XVI
CLAIM THAT THE TRIAL COURT'S CHARGE ON PUNISHMENT FAILED TO INSTRUCT THE JURY TO MITIGATING EVIDENCE

Petitioner's position is that although the court instructed the jury to consider all the evidence from both portions of the trial, the word "mitigating" was never explained in the Court's instructions. All post Pendry cases in Texas analyze mitigating evidence in the context of the existing special issues and none require an instruction to consider mitigation evidence and none provide a definition. No evidentiary hearing is needed.

XVII
CLAIM THAT THE PROSECUTORS ENGAGED IN REPEATED AND CONTINUING MISCONDUCT

A careful review of the entire record reveals no conduct by the prosecutors that would constitute misconduct. The prosecutor's conduct was proper, and unobjected to by trial counsel, against whom petitioner has made no complaint. No evidentiary hearing is needed.

XVIII
CLAIM THAT THE STATE PRESENTED IMPERMISSIBLY INFLAMMATORY AND PREJUDICIAL EVIDENCE AND ARGUMENT CONCERNING THE CHARACTER AND WORTH OF THE DECEASED

The petitioner's position is that at both phases of the trial, the prosecution present impermissibly inflammatory and prejudicial evidence and argument concerning the character of the decease [sic]. The claim is that those actions deprived petitioner of a fundamentally fair trial at

both the guilt and punishment phases and would require a reversal of petitioner's conviction and sentence. A careful review of the entire record reveals no impermissibly inflammatory and prejudicial evidence or argument. The evidence admitted concerning the decease [sic] was proper as was the argument. No objection was made at trial to the State's jury argument and petitioner makes no compliant with regard to his trial counsel's performance. No evidentiary hearing is needed.

XIX
CLAIM THAT THE STATE PRESENTED HIGHLY PREJUDICIAL PHOTOGRAPHS AS VICTIM IMPACT EVIDENCE

The petitioner's position is that during the State's case in chief, the prosecution offered into evidence numerous photographs depicting the victim's body after the murder. A careful review of both the testimony and of the photographs offered fails to support this position. Some of the photographs offered showed the location of the body, where it was found to confirm testimony of police officers. Other photographs showed the marks on the neck where the ligature was used to strangle the deceased. None of the photographs offered were "gruesome" or "turid and sensational". None of the photographs offered were improper. No objection was made at trial regarding introduction of crime scene photographs and petitioner makes no complaint with regard to his trial counsel's performance. No evidentiary hearing is needed.

XX
CLAIM THAT THE TRIAL COURT ERRED BY REQUIRING PROSPECTIVE JURORS TO TAKE AN OATH THAT THE DEATH PENALTY WOULD NOT AFFECT THEIR DELIBERATIONS

Petitioner complains that the mandatory oath required of a prospective juror by Texas Penal Code, Section 12.31(b) abrogated the jurors sense of responsibility and undermined the reliability of petitioner's death sentence. The courts have consistently disagreed with petitioner's position. Constitutional challenges similar to petitioner's have been denied in *Granviel v. State,* 723 S.W. 2d 141 (1986); *Teague v. State,* 864 S.W. 2d 505 (1993); and *Clark v. State,* 881 S.W. 2d; 682 (1994). No evidentiary hearing is needed.

XXI
CLAIM THAT THE TRIAL COURT PREVENTED PETITIONER FROM PRESENTING MITIGATING EVIDENCE CONCERNING HIS PRIOR CONVICTION FOR MURDER

At trial, petitioner attempted to "go behind" his previous murder conviction and explain the circumstances of the killing by putting petitioner's mother on the stand. The trial court immediately recognized the testimony of the mother to be hearsay, and did not allow it. The portions of comments made by the trial judge, outside the presence of the jury, are as quoted by petitioner taken out of context. The trial court and defense counsel had the following discussion:

The Court: "Now, I don't see how you're going to get into that based upon hearsay, but if you can tell me how you're going to get there and where

you're going to, then I'll certainly allow it. I'm not trying to – I want you to be able to do the very best you can for your client and put on whatever you believe is necessary for – in your client's interest. But that's hearsay."

Mr. Spence: "I cannot get there from here, your Honor." (Vol. XVII, p. 782-783).

A careful review of the record does not support petitioner's position that the trial court prevented petitioner from presenting mitigating evidence. Instead a review of the record reveals that the trial court was willing to allow defense counsel to present anything that was proper, but would not allow improper hearsay testimony. No exception to the hearsay rule was cited by defense counsel which would have allowed the testimony. No evidentiary hearing is needed.

6. *RECOMMENDATION OF THE TRIAL COURT ON PETITIONER'S CONTENTIONS*: The undersigned trial judge finds there is no merit to the application for writ of habeas corpus, and no useful purpose would be served by holding an evidentiary hearing. It is recommended that the petitioner's application be in all things DENIED.

7. *ATTACHMENTS TO THIS ORDER*: Attached to this order are the following:

a. Defendant's application for writ of habeas corpus filed on March 2, 1992 consisting of one hundred nineteen (119) pages;

b. A copy of the indictment in Cause No. 3644;

8. *ORDER RE DISTRIBUTION*: The following distribution shall be made of this order, complete with attachments:

a. The original shall be mailed to the Clerk, Court of Criminal Appeals, P.O. Box 12308, Capitol Station, Austin, Texas 78711;

b. A copy shall be delivered to the District Attorney for the 51st Judicial District, San Angelo, Texas 76903;

c. A copy shall be mailed to the petitioner, TED CALVIN COLE, #906, Ellis I Unit – D/R, Huntsville, Texas 77343

d. A copy shall be filed in File No. CR88-0043-A

SIGNED this the 10 day of May, 1999.

/s/ John E. Sutton
John E. Sutton
District Judge Presiding

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 41,673-01

EX PARTE TED CALVIN COLE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM TOM GREEN COUNTY

The order was delivered per curiam. Womack, J., filed a dissenting opinion, in which Price, J., joined; Meyers, J., shown not participating.

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

On June 4, 1988, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, V.A.C.C.P., and the trial court, accordingly, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. *Cole v. State,* No. 70,401 (Tex. Crim. App. delivered September 26, 1990).

In his application, applicant presents twenty-one allegations in which he challenges the validity of his conviction and resulting sentence and alleges ineffective

assistance of counsel at trial and on appeal. The trial court did not hold an evidentiary hearing. The trial court entered findings of fact and conclusions of law with regard to applicant's allegations, recommending that the relief sought be denied.

This Court has reviewed the record with regard to applicant's allegations. We adopt the trial court's findings of fact and conclusions of law with the exception of the conclusion that trial counsel rendered deficient performance under allegation three and the conclusion concerning all post-*Penry*[1] cases under allegation sixteen. Upon such basis, the relief sought is denied.

IT IS SO ORDERED THIS THE 24TH DAY OF NOVEMBER, 1999.

PER CURIAM

EN BANC
DO NOT PUBLISH

---

[1] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

TED CALVIN COLE, Petitioner, V. GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	CIVIL ACTION NO. 6:00-CV-014-C DEATH PENALTY CASE

ORDER

(Filed Mar. 5, 2001)

The Court has considered the Petition for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner, Ted Calvin Cole (Cole), on June 1, 2000, together with Respondent's original and amended Answers and Motions for Summary Judgment and Cole's replies filed thereto. The relevant state court records have also been reviewed by the Court, along with additional documentary evidence and affidavits submitted by the parties.

BACKGROUND

The Director has custody of Cole pursuant to a judgment and sentence from the 51st Judicial District Court of Tom Green County, Texas, in Cause No. CR88-0043-A, styled *The State of Texas vs. Ted Calvin Cole.*

Cole was indicted on January 7, 1988, for the capital offense of murdering Raymond C. Richardson in the course of committing and attempting to commit the offense of robbery, which occurred on or about December 13, 1987.

On June 3, 1988, a jury found Cole guilty of capital murder. Following a separate punishment hearing, on June 4, 1988, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. art 37.071(b), and Cole was sentenced to death.

Appeal was automatic to the Texas Court of Criminal Appeals, which affirmed Cole's conviction in an unpublished opinion delivered September 26, 1990. *Cole v. State*, No. 70,401 (Tex. Crim. App. 1990). Rehearing was denied on November 14,1990, and the mandate issued thereafter on November 30, 1990.

On April 22, 1991, the United States Supreme Court denied certiorari review. *Cole v. Texas*, 499 U.S. 982 (1991).

An execution date was set for September 20, 1991, and attorney Carlton McLarty filed an application for stay on September 10, 1991, and sought permission to file a state habeas application. Thereafter, Cole, through his habeas attorney, filed a state writ of habeas corpus petition on March 2, 1992. The trial court issued findings of fact and conclusions of law on May 10, 1999, recommending denial of habeas relief on all of Cole's claims. The trial court did, however, find that Cole's appellate attorney was not reasonably effective but that Cole could not demonstrate prejudice.

On November 24, 1999, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions

with two exceptions: the trial court's conclusion that Cole's attorney rendered deficient performance under state writ allegation three (ineffective assistance for failing to raise any colorable points of error on appeal) and the conclusion that under allegation sixteen (trial court's charge on punishment failed to instruct the jury to consider mitigating evidence in determining the appropriate punishment) "all post-*Penry* cases in Texas analyze mitigating evidence in the context of the existing special issues and none require an instruction to consider mitigating evidence and none provide a definition."

The Court of Criminal Appeals then denied habeas relief by written order on November 24, 1999. *Ex parte Cole*, Application No. 41,673-01.

On February 7, 2000, Cole moved for appointment of attorneys Robert C. Owen and Raoul D. Schonemann to initiate federal habeas proceedings; this Court granted the request on February 10, 2000; and Cole filed his federal writ of habeas corpus petition on June 1, 2000, pursuant to 28 U.S.C. § 2254.

The Respondent filed his answer and motion for summary judgment on June 29, 2000, and Cole filed a reply July 24, 2000.

Pursuant to the Court's February 28, 2000, scheduling order, a hearing was held on August 2, 2000, at which time both parties presented oral arguments. No witnesses were called by either party. The Respondent argued that Cole's ineffective-assistance-of-counsel claims were procedurally barred, and Cole's attorneys argued that Cole could meet the cause and prejudice standard for failure to exhaust the ineffective-assistance-of-counsel claims. Although the Respondent's attorney argued procedural bar, she requested

permission to respond to the ineffective-assistance-of-counsel claims should the Court find that Cole had shown cause and prejudice. The Court permitted the parties to expand the record on the procedural bar issue. Thereafter, the Court found that Cole had shown cause and prejudice for failing to exhaust his ineffective-assistance-of-counsel claims based upon the record indicating that from June 12, 1992, until July 15, 1998, Cole's habeas attorney attempted to withdraw from representation, but the trial court failed to rule on the motions to withdraw. Then, after permitting habeas counsel to withdraw, the trial court held a hearing on September 4, 1998, to determine if Cole wanted to pursue his state habeas proceeding and if he wanted an attorney. At that hearing, the trial court advised Cole that he would prepare the necessary paperwork to the Court of Criminal Appeals to request that the Court of Criminal Appeals appoint an attorney. On May 10, 1999, without an attorney having been appointed to represent Cole and without notice to Cole, the trial court entered its findings and conclusions recommending denial of habeas relief. The Court of Criminal Appeals denied relief on November 24, 1999, without an attorney having been appointed to represent Cole.

This Court found that Cole had shown cause and prejudice for his failure to exhaust his ineffective-assistance-of-counsel claims, and Respondent was permitted to file a supplemental Answer and Motion for Summary Judgment. Cole then filed a reply.

JURISDICTION

This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.

STANDARD OF REVIEW

Cole's federal habeas petition was filed June 1, 2000, a date after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"); thus, his claims must be reviewed under the amended habeas provisions effected by the Act. *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997).

THE OFFENSE

Cole was found guilty of murdering Raymond C. Richardson while in the course of committing and attempting to commit the offense of robbery. Cole gave two sworn statements confessing to the murder by strangulation and robbing Mr. Richardson of $20.00. Cole's half-brother and his wife participated in the criminal offense. Cole's sister-in-law testified against Cole at the trial. Evidence was submitted that Cole had a prior conviction for murder and a conviction for two counts of aggravated sexual assault involving minors.

CLAIMS FOR RELIEF

CLAIM ONE

The jury that sentenced Cole to death was unable to consider and give effect to the mitigating evidence in his case, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Cole's first claim is that the Texas capital sentencing scheme failed to provide the jury with any vehicle by which to give mitigating effect to evidence of Cole's "destructive family background" and "organic neurological

deficits" in violation of the Sixth, Eighth, and Fourteenth Amendments.

During the punishment phase, Cole presented testimony from Cole's mother and Cole's aunt regarding Cole's alleged "destructive family background" –

1. that Cole's mother was an alcoholic who was unable to care for her children;

2. that his father was arrested for trying to rob a liquor store;

3. that his father deserted the family when Cole was five years old;

4. that Cole's mother moved with her children to her parents' home;

5. that Cole's grandparents were alcoholics and did not want the children to live with them;

6. that Cole's grandparents' home was eight miles out of town and Cole was isolated from other children;

7. that school buses did not run to the grandparents' home and the grandparents would not allow Cole's mother to use their car to take Cole to school;

8. that Cole was placed in a children's home at age five;

9. that during Cole's five years in the home, his mother only visited two times;

10. that Cole's father never visited Cole at the home; and

11. that Cole's uncle adopted Cole's brother, but not Cole.

In addition, Dr. Jarvis Wright testified that Cole had a "very rugged, rough childhood"; that he showed evidence of having experienced "a bad, very painful background"; that he "never felt loved and worthwhile in his life," all resulting in Cole's experiencing "terrific needs for nurturance" and "chronic depression."

No testimony was presented that these events caused any type of psychological effect on Cole. Instead, the opposite was shown – Cole's mother testified that when she and Cole moved to San Angelo when Cole was age eleven, he attended school, made good grades, had no trouble with the law, and "tried to be a perfect child." Cole's aunt Barbara Dean testified that she and her husband sponsored Cole while he was in the children's home, provided him clothes, and allowed him to visit their home for holidays. At best, Mrs. Dean testified that Cole had a good time while visiting, but that he never showed any emotion about returning to the children's home.

Regarding Cole's alleged "organic neurological deficiency," Cole relies on testimony from Dr. Jarvis Wright which states that Cole "lacked a great deal of impulse control. And I think that's important in these tests I gave. . . . It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of [Cole's] background, all these other things, we're going to have an individual with some real problems with impulse control." However, on cross-examination, Dr. Wright admitted, "I don't know whether there's [central nervous system] damage or not," and that the only way to determine it "sometimes is [with] a post-mortem examination." Wright also admitted that the Haptic Visual Discrimination Test, the test Wright described as providing the basis for his conclusion that Cole had central nervous

damage, is based solely on Cole's subjective descriptions of objects hidden behind a screen which he attempts to identify through touch and was not based on any objective criteria.

Several witnesses and defense counsel attested to Cole's ability to change his behavior over time, indicating that any condition was not permanent. Dr. Jarvis Wright testified that research indicates that "individuals like [Cole], individuals who have had this kind of background, tend to begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a lot and change a good bit." He also testified that the factors that "cause maladaptive, maladjustive behavior tend to change" as a person gets older. Wright also stated that "evidence is overwhelming" that there are individuals who have behaved like Cole and who "burn out" such that there is a "good chance" of some change later in life. Defense witness Dr. Wendel Dickerson testified that just because Cole may be considered dangerous today does not mean that he is going to be dangerous in the future because factors such as time, experience, bodily changes, and other conditions all change. During closing argument, defense counsel pointed out Dr. Wright's testimony "as to burnout, what happens when a person becomes forty, fifty, sixty years old. There's no guarantee of [Cole causing a future act of violence]. But there's no guarantee that anything else will happen."

At the conclusion of the punishment phase, the jury answered affirmatively both special issues submitted pursuant to Tex. Code Crim. Prot. art; 37.071(b):

> (1) Was the conduct of the defendant, TED CALVIN COLE, that caused the death of the deceased, RAYMOND C. RICHARDSON,

committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

(2) Is there a probability that the defendant, TED CALVIN COLE, would commit criminal acts of violence that would constitute a continuing threat to society?

The jury charge also contained the following instruction:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answer to Special Issues hereby submitted to you.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court found that when the defendant places mitigating evidence before the jury, Texas juries must be given instructions which allow the jury to give effect to that mitigating evidence and to express its reasoned moral response to that evidence in determining whether to impose the death penalty.

The Fifth Circuit has formulated a two-pronged analysis for evaluating *Penry* claims which applies to the instant case. To be entitled to relief, a habeas petitioner must demonstrate that the proffered evidence was constitutionally relevant mitigating evidence, and, if he so

demonstrates, he must show that the proffered evidence was beyond the "effective reach" of the jurors. *Madden v. Collins*; 18 F.3d 304, 308 (5th Cir. 1994) (citing *Johnson v. Texas*, 509 U.S. 350, 365-67, 113 S. Ct. at 2668-69); *Davis v. Scott*, 51 F.3d 457, 460 (5th Cir. 1995). Before the court may determine whether the [jury] instructions adequately allowed for mitigation the court must fast determine whether the mitigating evidence was constitutionally relevantion". *Etheridge v. Johnson*, 49 F.Supp.2d 963, 986 (S.D. Tex. 1999).

With regard to the first prong, the Fifth Circuit has held:

> The first inquiry in a *Penry* claim is whether the mitigating evidence is relevant. Phrased differently, does the evidence implicate the basic concern of *Penry* that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . In order to present relevant evidence that one is less culpable for his crime, the evidence must show (1) a *uniquely severe permanent handicap* with which the defendant is burdened through no fault of his own, . . . and (2) that the *criminal act was attributable to this severe permanent condition.*

Davis v. Scott, 51 F.3d at 460 (internal quotations and citations omitted, emphasis added); *see also Madden v. Collins*, 18 F.3d at 307 (requiring "nexus" between mitigating evidence and criminal act to establish *Penry* violation); *Harris v. Johnson*, 81 F.3d 535, 539 (5th Cir. 1996) (same); *Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997) (same). If the evidence presented is not constitutionally relevant mitigating evidence, then the court can reject the

Penry claim on that basis and need not address the second prong. *Madden v. Collins*, 18 F.3d at 308 (rejection of *Penry* claim may be based on failure of the evidence relied upon to be constitutionally relevant mitigating evidence).

With regard to the second prong, the constitutionality of the Texas capital sentencing scheme, which considers mitigating evidence solely through the special issues, "turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Madden v. Collins*, 18 F.3d at 306 (quoting *Jurek v. Texas*, 428 U.S. 262, 272, 96 S. Ct. 2950, 2956 (1976)). Thus, assuming evidence presented during punishment is constitutionally relevant mitigating evidence, then the requirements of the Eighth Amendment are satisfied if the mitigating value of the evidence, as actually proffered at trial, is within "the effective reach" of the jury in responding to the statutory punishment issues and instructions. *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993). Mitigating evidence is beyond the effective reach of the sentencer only if there exists a "reasonable likelihood that the jury would have found itself *foreclosed* from considering [the mitigating evidence]" in answering the special punishment issues submitted to the jury. *Johnson v. Texas, supra* (emphasis added). A special jury instruction is then required only if a "major mitigating thrust" of the evidence was substantially beyond the scope of all the special issues. *Graham v. Collins*, 950 F.2d 1009, 1026-27 (5th Cir. 1992); *see Barnard v. Collins*, 958 F.2d 634, 637 (5th Cir. 1992) (same).

While "the sentencer must be allowed to consider in mitigation 'any aspect of the defendant's character or record and any circumstances of the defense that the defendant proffers as a basis for a sentence less than

death,' ... [n]othing in the Constitution obligates state courts to give mitigating evidence instructions when no evidence is offered to support them." *Delo v. Lashley*, 507 U.S. 272, 275-77 (1993) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965 (1978)). It follows, then, that a death-sentenced inmate is not entitled on appeal to recharacterize evidence as mitigating in a manner different from that in which it was proffered to the sentencer.

Finally, although relevant mitigating evidence may not be placed beyond the effective reach of the sentencer, the Constitution does not require unfettered sentencing discretion in the jury, and a state may guide the sentencer's consideration of mitigating evidence in an effort to achieve a more rational and equitable result. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *Tuilaepa v. California*, 512 U.S. 967, 971, (1994); *Johnson v. Texas*, 509 U.S. at 362. Thus, there is no requirement that a jury be allowed to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant. *Johnson*, 509 U.S. at 372. If mitigating evidence is within the effective reach of the jury, the fact that a defendant can identify mitigating value beyond the scope of the statutory issues does not require the submission of an additional issue or instruction allowing the jury to give further mitigating effect to the evidence. *Id.*; *Graham v. Collins*, 506 U.S. at 474; *see also Boyde v. California*, 494 U.S. 370, 382 n.5 (1990) (defendant is entitled only to a fair vehicle by which sentencer can give effect to mitigating force of his evidence). The defect identified in *Penry* was that the jury was prevented from giving *any* mitigating effect to the evidence. *See Saffle v. Parks*, 494 U.S. 484, 489 (1990).

Cole claims that his "destructive family background" evidence was mitigating but that the jury was unable to give effect to the evidence. Although such evidence can be considered mitigating, in *Cole's* case the evidence fails to meet the standard.

In *Graham v. Collins*, 950 F.2d at 1033, a majority of the Fifth Circuit observed that a defendant who introduced evidence of the adverse effects of a troubled childhood might well raise a *Penry* claim. However, the court did not find a *Penry* issue in Graham's case because there was "no evidence of any effect this [evidence of abused childhood] had on Graham, or any reaction on his part to it, and no attempt was made to even explore that subject" *Id.* The Fifth Circuit has recognized that an abused childhood could rise to the level of a *Penry* claim "if the traumatic events *caused* psychological effects to which the criminal conduct was attributable." *Madden v. Collins*, 18 F.3d at 308 (emphasis added) (citing *Barnard v. Collins*, 958 F.2d at 638-39)). There testimony revealed that Barnard's parents divorced when he was four years old, that Barnard lived alone with his mother until age thirteen, that Barnard's father was absent from his life during this period, that there were "difficulties" when Barnard was later sent to live with his father, and that Barnard later lived with an uncle. *Barnard v. Collins*, 958 F.2d at 638. However, the Fifth Circuit correctly affirmed the district court's rejection of Barnard's portrayal of this testimony as mitigation evidence of permanent characteristics or disabilities stemming from his troubled childhood because there was "no evidence that these childhood experiences had any psychological effect on Barnard" and thus later led to his commission of the capital offense. *Id.* at 639.

Based on the record of proceedings before the Court, Cole's evidence of a "destructive family background" fails to suffice as mitigating evidence. Cole fails to show that his commission of capital murder was in any way attributable to his "destructive family background," and thus his evidence does not fall within the ambit of *Penry*. *See Davis v. Scott*, 51 F.3d at 460 (requiring nexus). Dr. Jarvis Wright's punishment phase testimony failed to establish that Cole's childhood trauma "caused psychological effects to which the criminal conduct was attributable." *Madden v. Collins*, 18 F.3d at 308 (emphasis added) (citing *Barnard v. Collins*, 958 F.2d at 638-39). Because no nexus was established between events in Cole's childhood and his later commission of the capital murder offense, the testimony did not reveal constitutionally relevant mitigating evidence.

Cole's claim regarding destructive family background may be rejected because the evidence relied upon fails to be constitutionally relevant mitigating evidence. As the Fifth Circuit explained in *Madden v. Collins*:

> [R]ejection of a *Penry* claim does not necessarily mean in every case that the jury was able to evaluate the proffered evidence fully and fairly. A *Penny* claim rejection may also be based on the failure of the evidence relied upon by the petitioner to be constitutionally relevant mitigating evidence. As we find such failure here, we need not and therefore do not consider the ability of the jury to consider under the Texas special issues the evidence pointed to by Madden.

Madden v. Collins, 18 F.3d at 307.

Cole also claims that his "organic neurological deficits" evidence was mitigating but that the jury was unable

to give effect to the evidence. Although such evidence can be considered mitigating, in Cole's case the evidence fails to meet the standard.

In *Graham,* the Fifth Circuit emphasized that *Penry's* evidence "was strongly mitigating because these characteristics were due to the *uniquely severe permanent handicaps* with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage, and an abused childhood" *Graham v. Collins*, 950 F.2d at 1029 (emphasis added). "By imposing the requirement that a handicap be 'uniquely severe,' we acknowledged that not all organic brain damage will establish a *Penry* claim; rather, *organic brain damage is an example of the type of evidence that we require as a minimum* for a challenge under *Penry.*" *Madden v. Collins,* 58 F.3d at 308 (emphasis added).

The evidence is entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit. Testimony from Dr. Jarvis Wright fails to establish that Cole actually suffers from any organic brain damage, let alone that the disorder constitutes a "uniquely severe permanent handicap" to which Cole's criminal act was attributable. *See Davis v. Scott,* 51 F.3d at 460 (requiring a nexus between the handicap and criminal act); *Madden v. Collins,* 18 F.3d at 307 (same).

Even presuming Cole has a central nervous system dysfunction which caused a lack of impulse control and that the lack of impulse control is the cause of Cole's committing capital murder, then he is still not entitled to collateral relief. Noticeably absent from the testimony of any defense witness was evidence that Cole was totally incapable of controlling his impulses. Further no evidence

was produced to prove that Cole was somehow unable to distinguish right from wrong. To the contrary, when asked if Cole "knows right from wrong," Dr. Wright unequivocally answered, "No doubt" Cole thus fails to establish the necessary nexus – that the criminal act was attributable to a "severe permanent handicap." *See Madden v. Collins*, 18 F.3d at 307 (rejecting petitioner's claim that his antisocial personality disorder caused him to be more aggressive or violent and prevented him from understanding the wrongfulness of his actions).

Cole also fails to prove that his alleged neurological deficiency was permanent. Given the fact that defense witnesses testified as to Cole's likelihood for change, there is no evidence to suggest he suffered from any "severe permanent handicap" which might make him less culpable than defendants who have no such excuse. *Madden, supra* (citing *Penry,* 492 U.S. at 319). Consequently, Cole's claim should be rejected as a matter of law because the evidence he relies upon is not constitutionally relevant mitigating evidence. *Madden v. Collins,* 18 F.3d 307 ("A *Penry* claim rejection may also be based on the failure of the evidence relied upon by the petitioner to be constitutionally relevant mitigating evidence.").

Even if Cole's evidence of "destructive family background" and "organic neurological deficits" could be considered constitutionally relevant mitigating evidence, he fails to prove he was entitled to a special jury instruction. In *Graham v. Collins,* the Fifth Circuit held that a special jury instruction was required only if a "major mitigating thrust" of the evidence was substantially beyond the scope of all the special issues. 950 F.2d at 1026-27; *see Barnard v. Collins,* 958 F.2d at 637 (same). Here,

no special jury instructions were necessary because the evidence was not beyond the effective reach of the jury.

Evidence of Cole's destructive family background could be considered under the future dangerousness special issue. *See Madden v. Collins,* 18 F.3d at 304 n.15 (" . . . evidence of Madden's personality disorder, learning disability, and *troubled childhood* were within the effective reach of the jury, as such evidence could be considered by the jury to some extent under one of the special issues – particularly the issue of future dangerousness.") (emphasis added).

Evidence of Cole's organic neurological deficiency could be considered under either the deliberateness or the future dangerousness special issues. Testimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his "outgrowing" the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent. *See Franklin v. Lynaugh,* 487 U.S. 164 (1988). In addition, in *Demouchette v. Collins,* the jury was able to give mitigating effect to Demouchette's personality disorder evidence in deciding whether he acted deliberately, the first special issue in Texas. 972 F.2d 651, 653-54 (5th Cir. 1992).

Since Cole cannot prove that the "major mitigating thrust" of his evidence of a destructive family background was substantially beyond the scope of the special issues, he is not entitled to any special jury instruction. *Graham v. Collins,* 950 F.2d at 1026-27; *see Barnard v. Collins*, 958 F.2d at 637 (same).

On state habeas review, the Texas courts found that the punishment-phase instructions did not impermissibly

limit the jury's ability to give effect to Cole's evidence. This conclusion is reasonable in light of the nature of Cole's allegedly mitigating evidence.

Because the Texas courts' rejection of Cole's question of law claim was not unreasonable, Cole is not entitled to federal habeas relief because he cannot prove the state court's rejection of his claim was contrary to established federal law. *Williams v. Taylor,* 120 S.Ct. 1495, 1519 (2000) (to be contrary to established federal law requires that the state court arrive at a conclusion "diametrically" opposed to that reached by the Supreme Court).

In *Robinson v. Johnson,* 151 F.3d 256 (5th Cir. 1998), Robinson claimed in his direct appeal that "the jurors were not able to consider the mitigating effect of his mental disease or defect during the punishment phase of the trial." *Id.* at 264. The trial court had submitted the exact same special issues and instruction as were given in Cole's case. The Fifth Circuit found that "based on the evidence Robinson presented at trial, we conclude that the jury could give mitigating effect to Robinson's evidence of mental illness in answering the second special issue, which concerned Robinson's future dangerousness." *Robinson v. Johnson,* 151 F.3d at 266, citing *Davis v. Scott,* 51 F.3d 457, 464 (explaining that "a **Penry** claim does not arise when constitutionally relevant evidence 'can be given mitigating effect *in some way* under the Texas special issues'") (quoting *Motley v. Collins,* 18 F.3d 1223, 1234 (5th Cir. 1994)) (emphasis in original).

To the extent Cole seeks a special jury instruction even though the evidence was within the effective reach of the jury, then he asks this Court to announce a new rule of

constitutional law in violation of the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989).

In addition to arguing that the trial court refused his special jury instructions, Cole contends that he requested the court define "deliberately" in the first special issue. To the extent Cole would argue that he was entitled to such a definition, he is foreclosed by circuit precedent, *Woods v. Johnson,* 75 F.3d 1017, 1033-34 (5th Cir. 1996), and barred by *Teague.*

Finally, although Cole alleges that his Sixth Amendment rights were violated, he fails to explain why he believes this is true. Cole is not entitled to habeas relief because "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle,* 694 F.2d 1008, 1012 (5th Cir. 1983). *See Blackledge v. Allison,* 431 U.S. 63, 74 (1977) (noting that claims which are "unsupported by specifics are subject to summary dismissal").

CLAIM TWO

The admission of Dr. Richard Coons' improperly obtained testimony regarding future dangerousness violated Mr. Cole's Sixth and Fourteenth Amendment rights

In his second claim for relief, Cole argues that the admission of testimony of psychiatrist Dr. Richard Coons regarding Cole's "future dangerousness" violated his Sixth and Fourteenth Amendment rights.

The trial court records indicate that a pretrial hearing was held on February 2, 1988, wherein Cole's counsel moved for appointment of a psychiatrist so that counsel

could determine whether or not to raise a competency issue. The court granted Cole's request and appointed Dr. Richard Coons, the psychiatrist agreed upon by both sides. Court papers show that other than the brief mention of "competency," the specific parameters of Coons' examination were not delineated by the court at the hearing.

One week later, however, the trial court signed orders for Cole to be temporarily committed to the custody of both Dr. George Parker and Dr. Richard Coons on February 19, 1988, for the purposes of their examining Cole to determine: (1) if he was competent to stand trial; (2) if not, whether there was or was not a substantial probability that Cole would attain competency to stand trial within the foreseeable future; and (3) if, as a result of mental disease or defect, Cole did not know his conduct was wrong at the time he committed the capital offense.

The court ordered the filing of separate written reports concerning "the competency to stand trial and the question of the Defendant's sanity at the time of the alleged offense," as well as a separate report setting forth the examiner's observations and findings concerning whether Cole was mentally ill or mentally retarded.

The court also specifically ordered that prior to the interview, the examiners advise Cole that the examination was conducted pursuant to a court order; that "none of the communications will be privileged"; that a copy of the report will be available to the court, the district attorney, and the defense attorney; and that the examiner "may be required to testify in Court regarding all communications which occur during the examination and interview."

Based solely on the record, it appears Cole's trial attorney was not aware the examination would encompass

future dangerousness. Further, Cole's trial attorney, Bob Spence, signed a sworn affidavit prior to his death, stating that he was not aware that the examination by Coons would encompass future dangerousness.

At Cole's capital murder trial, Dr. Richard Coons testified that prior to conducting any interviews, he advised Cole why the examination was being done; that Cole had the right not to participate in the examination; that none of the communications would be privileged; that a copy of the report would be available to the court, the district attorney, and the defense attorney; and that Dr. Coons "maybe required to testify in court regarding all communications which occurred . . . during the examination and interview."

Dr. Coons also testified that he gave Cole his *Miranda* warnings, that they discussed the warnings, and that later in the examination Dr. Coons reiterated the warnings. He further related that he told Cole that he had the right to have his lawyer present to advise him during the examination; that he had the right to remain silent and that any statement he made could be used in evidence against him.

Dr. Coons further testified that he told Cole that his statements could be used at guilt/innocence not for proving his guilt, but for the purpose of opinions about his competency and sanity. Dr. Coons also testified that he specifically told Cole: "That I could he a witness at the punishment phase of his trial. We discussed the issue about whether – that the jury would be asked to decide whether a defendant – whether there was a probability that the defendant would commit criminal acts of violence in the future which would constitute a continuing threat to society and that that – that I might well be called as a

witness in that regard and that Dr. Parker might be called as a witness in that regard."

Although defense counsel objected once to Dr. Coons' testimony, the sole basis explained for the objection was that "if the *Miranda* warnings have not been given to the defendant, then basically the competency and anything that has been tested by the doctor is not going to be admissible." No objection was ever raised that defense counsel was unaware Dr. Coons' interview would encompass the issue of future dangerousness.

Dr. Coons offered no testimony that Cole ever requested the presence of his attorney or that he refused to participate after being informed that either Dr. Coons or Dr. Parker may be called to testify during punishment regarding future dangerousness.

Thereafter, Dr. Coons testified that he regarded Cole as having "a number of sociopathic antisocial personality features to his personality"; that Cole committed the capital murder with "deliberation" and exhibited "willingness to take the life of another person for financial gain"; that it did not bother Cole that he killed this older man; that the only thing that bothered Cole about the murder was his getting caught and that Cole showed a lack of remorse or lack of conscience for his actions.

Defense witness Dr. Jarvis Wright testified that he thought Cole would be a future danger. For example:

a. "I think if [Cole] were released today on the street, there's a much greater probability of dangerous behavior than with the rest of us . . . I think for [Cole] it's going to be much greater [probability] than for most individuals right now. So I think there's a possibility

of future violence. I don't think there's any way we – I think we'd be foolish to say otherwise. I think we're looking at years from now."

b. Question: "Given [Cole's] background, do you think it's more probable that he would commit those acts [of violence]?"

Answer: "Absolutely."

c. Question: " – Do you feel he's a dangerous person?"

Answer: "Yes."

Question: "Okay. And isn't it a fact that there's a probability that [Cole] would commit criminal acts of violence that would constitute a continuing threat to society in the future?"

Answer: "I think that probability is stronger than for the rest of us, yes."

d. "[Cole] has a greater probability than the rest of us of doing something violent if he's turned loose right now."

e. Question: "And it's very probable that if a person has committed two murders and sexually abused children, that he's going to – it's probable that he's going to continue doing that; isn't that correct, Sir? There's a greater probability that he's going to continue that; is that correct?"

Answer: "He would – yes, there would be a greater probability. Not a very probable, but there would be a – there would be a greater

> likeliness than those of us in the normal population."

In addition, defense witness Dr. Wendel Dickerson agreed that psychiatric tests would support a diagnosis of Cole being a sociopath or psychopath as well as suffering from "an attributive sociative reaction . . . almost a multiple personality kind of thing."

Cole's rights were not violated by the admission of Dr. Richard Coons' testimony regarding future dangerousness.

Cole submitted to the psychiatric examination freely and voluntarily after being fully advised of his rights and of the possible consequences, including the possibility that Dr. Coons might be called to testify at the punishment phase regarding future dangerousness.

Cole has never alleged that he failed to understand or appreciate the significance of the warnings as explained by Dr. Coons. To the contrary, defense witness Dr. Jarvis Wright testified that based on the Wechsler Adult Intelligence Scale, Cole registered a full scale I.Q. score of 121, and a performance I.Q. score of 132 – part of what Wright referred to as Cole's "fantastic raw material." Wright also testified that he found Cole to be "bright, very bright, sizzling bright."

It is entirely possible for a petitioner to waive his right to counsel. Although in *Estelle v. Smith*, the Supreme Court held that the Sixth Amendment is violated if defense counsel is not informed that a psychiatric interview will encompass future dangerousness issues, the Court also wrote that it was not holding that "[Smith] was precluded from waiving this constitutional right." 451 U.S. 454, 471 n.16 (1981). In *Estelle v. Smith*, the psychiatrist

was appointed by the trial court and the examination was conducted without any notice to the defense attorney and without his knowledge.

Given Cole's objective intelligence quotient scores, as well as his voluntary participation in the interview after being fully informed of his constitutional rights including his ability to stop the examination, the Court concludes that Cole waived his Sixth Amendment right to counsel such that Dr. Coons' testimony during the punishment phase did not violate constitutional standards.

Even if Cole did not waive his right to counsel and thus he was denied his Sixth Amendment right to counsel prior to submitting to the psychiatric evaluation, he is still not entitled to collateral relief. The Supreme Court has recognized that both Fifth and Sixth Amendment error in this context is subject to a harmless-error analysis. *Satterwhite v. Texas*, 486 U.S. 249, 257-58 (1988) (*Estelle* error subject to harmless-error analysis because "the effect of the Sixth Amendment violation is limited to the admission into evidence of [the psychiatrist's] testimony"); *Hogue v. Johnson,* 131 F.3d 466, 499 (5th Cir. 1997) (the *Brecht* harmless error analysis is to be applied in a federal habeas proceeding challenging a death penalty); *Barber v. Johnson*, 145 F.3d 234, 236 (5th Cir. 1998); *Woods v. Johnson,* 75 F.3d 1017, 1026-27 (5th Cir. 1996) (*Brecht* harmless error test applied to *Estelle* error); *Vanderbilt v. Collins*, 994 F.2d 189, 198-99 (5th Cir. 1993) (same). The Court in *Brecht v. Abrahamson* held that on federal habeas corpus review of state court convictions, the record must demonstrate that an alleged trial error "actually prejudiced" the petitioner before he is entitled to habeas corpus relief based on the error. 507 U.S. 619, 637 (1993). Even trial

error of constitutional magnitude provides a basis for reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict" *Id., quoting Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct 1239, 1253 (1946).

In the instant case, any error in the admission of Dr. Coons' testimony on future dangerousness was clearly harmless and did not contribute to the verdict obtained. Here, Cole's own expert witnesses, Dr. Jarvis Wright and Dr. Wendel Dickerson, concurred that Cole was a man who showed a probability for future violence. In addition, the State mentioned Dr. Coons only once during closing arguments.

On state habeas review, the Texas courts reasonably presumed that Cole's trial counsel was not aware the psychiatric interview would include the future dangerousness issue and thus Dr. Coons' testimony violated Cole's Sixth Amendment rights, because it was impossible to question counsel in that he had since died in an automobile accident.

The Texas habeas courts then correctly applied controlling federal precedent and found that the admission of Dr. Coons' testimony constituted harmless error:

> In reviewing the harm of Dr. Coons' testimony, the State mentioned Dr. Coons only once during closing argument. Dr. Coons' testimony on future danger issues was not the only testimony about future danger. [Cole's] own witnesses testified at length about the probability that [Cole] would be a danger to society. The complained about testimony of Dr. Coons' [sic] was clearly harmless and did not contribute to the verdict obtained.

The state court determination should be upheld on federal review because Cole fails to prove it is objectively unreasonable under *Williams v. Taylor,* 120 S. Ct. 1495, 1522 (2000), and thus he is not entitled to relief under the AEDPA as a matter of law.

CLAIM THREE

Cole was denied the effective assistance of counsel on direct appeal.

In his third claim, Cole alleges that he was denied his right to effective assistance of counsel on direct appeal because counsel failed raise "a clearly meritorious Sixth Amendment violation" concerning the admission of Dr. Richard Coons' testimony on future dangerousness. He further alleges that "[h]ad appellate counsel raised this issue on direct appeal, [Cole's] death sentence would have been reversed."

The trial court appointed attorneys S. Ancial Middlebrook and Max Parket to represent Cole on direct appeal.

On August 24, 1989, attorney Middlebrook filed an appellate brief raising a single point of error challenging the sufficiency of the evidence supporting Cole's conviction for capital murder.

In his state habeas petition, Cole alleged that his appellate counsel was ineffective for failing to raise three specific points on appeal – (1) that the trial court failed to instruct the jury on mitigating evidence, (2) that Cole's rights were violated by a warrantless search which resulted in illegally obtained evidence and incriminating statements, and (3) that there had been no challenge to

the sufficiency of the evidence supporting an affirmative finding as to the punishment phase second jury issue.

During the state post-conviction proceedings, the State conceded that the performance of Cole's appellate counsel was deficient.

The state trial court found that appellate counsel's performance was deficient, but found that Cole had failed to show that he was prejudiced by such performance.

The Texas Court of Criminal Appeals declined to adopt the trial court's findings that appellate counsel's performance was deficient.

Code did not allege in his state habeas petition that his appellate counsel was ineffective for failing to argue a Sixth Amendment violation based on the admission of Dr. Coons' testimony at punishment.

A criminal defendant is constitutionally entitled to the effective assistance of counsel on direct appeal where the appeal is a matter of right under state law. *Evitts v. Lucey*, 469 U.S. 387 (1985).

Counsel's performance on appeal is measured using the same standards applied to trial counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* Cole must prove that his attorney's performance was deficient and that he was actually prejudiced by counsel's acts or omissions on appeal. *Penson v. Ohio*, 488 US. 75, 84 (1988). Cole "must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel." *Smith v. Robbins,* 528 U.S. 259, 289 (2000).

The state court's finding that Cole was not prejudiced by appellate counsel's deficient performance is *not* "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

Further, Cole was not prejudiced by appellate counsel's failure to raise his Sixth Amendment *Estelle v. Smith* claim on direct appeal. See discussion under Claim Two.

CLAIM FOUR

The trial court prevented Mr. Cole from presenting mitigating evidence concerning his prior convictions and thereby deprived him of protections guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In his fourth claim, Cole argues that the trial court erroneously excluded relevant mitigating evidence during the punishment phase of his trial in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. He challenges the exclusion of portions of Nancy Hickey's testimony in which she sought to explain why Cole entered a guilty plea to a previous murder conviction. Cole argues that the Eighth Amendment "commands that a defendant on trial for his life must be permitted the broadest latitude to present evidence that might serve 'as a basis for a sentence less than death.'" (citations omitted).

A review of the state record of transcribed proceedings reveals the following events transpired in regards to Cole's claim. At trial, defense counsel elicited from Ms. Hickey, Cole's mother, that Cole had pleaded guilty to a previous murder charge. Counsel then asked: "Do you know why he

plead 'guilty'?" At this time, the trial court excused the jury from the courtroom before Ms. Hickey could answer.

Outside the presence of the jury, the court stated that "[a]n individual pleads 'guilty' because they are guilty and for no other reason. If any party ever enters a plea other than that, it is an improper plea. The court then asked whether defense counsel was attempting to attack the prior murder conviction, and counsel answered negatively. Counsel then explained that his reason for asking the question was to "show the purpose for the plea of 'guilty,' and that is the fact that he was guilty of shooting Mr. Dedeker." He then stated that he would "like to go into the reason for the shooting."

The trial court pointed out that a stipulation to the evidence of the murder conviction was already admitted into evidence, and the court had "great difficulty" with an attack upon the stipulation. The court explained that any testimony from Ms. Hickey regarding the reason for the shooting is hearsay and therefore not admissible. The court then reasoned that if counsel could give a legitimate reason for admitting the hearsay, it would consider the reason. The court also stated that it wanted counsel "to be able to do the very best you can for your client and put on whatever you believe is necessary for – in your client's interest."

Despite the trial court's willingness to entertain a hearsay exception, Cole's attorney came up with no exception, and thus the court excluded that line of questioning as "rank hearsay."

Here, Cole does not argue that the evidence in question was not, in fact, hearsay. Neither does he point to any

applicable hearsay exception such that the evidence could have been admitted.

The testimony about which Cole complains was properly excluded by the trial court as hearsay, and neither the Eighth nor the Fourteenth Amendment provides justification for this Court to disregard the Texas courts' application of state hearsay rules.

Contrary to Cole's argument that the Eighth Amendment allows for the admission of such testimony, the Supreme Court refused an invitation to "fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment," recognizing that the Fourteenth Amendment is the proper vehicle for evaluating claims of erroneous admission/exclusion of evidence under state law. *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994) ("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings").

Cole cites no controlling authority that rules of evidence should be abandoned to allow for the admission of improper hearsay evidence about a defendant's previous convictions. Granting the relief Cole seeks would thus require the court to issue a new rule of constitutional law in violation of the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989).

Although Cole alleges that his Fifth and Sixth Amendment rights were violated, he entirely fails to explain why he believes these particular rights were abridged. Bald assertions without evidentiary support, such as the instant claim, are wholly insufficient to warrant collateral relief and do not compel federal courts to hold evidentiary hearings. *Ross v. Estelle,* 694 F.2d at 1011.

On state habeas review, the trial court appropriately summarized the testimony and rejected Cole's claim as follows:

> At trial [Cole] attempted to "go behind" his previous murder conviction and explain the circumstances of the killing by putting [Cole's] mother on the stand. The trial court immediately recognized the testimony of the mother to be hearsay, and did not allow it. . . . A careful review of the record does not support [Cole's] position that the trial court prevented [Cole] from presenting mitigating evidence. Instead a review of the record reveals that the trial court was willing to allow defense counsel to present anything that was proper, but would not allow hearsay testimony. No exception to the hearsay rule was cited by defense counsel, which would have allowed the testimony. No evidentiary hearing is needed.

This conclusion was later adopted by the Texas Court of Criminal Appeals when it denied habeas relief. The state court adjudication of the issue was not unreasonable under *Williams v. Taylor,* 120 S. Ct. 1495, 1522 (2000), and thus habeas relief is unwarranted.

CLAIM FIVE

Mr. Cole was denied the effective assistance of counsel at trial, in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution

In his final habeas claim, Cole alleges trial counsel was ineffective because "despite his admitted inexperience defending capital cases and his candid acknowledgment that the assistance of co-counsel was necessary," counsel

failed to retain co-counsel after the trial court granted funds for that purpose. Cole also claims that counsel was ineffective because he failed to conduct a reasonable investigation to present and develop mitigating evidence and failed to effectively prepare his defense witnesses to present the mitigating evidence at trial. He also claims that his attorney failed to demand access to adequate investigative resources and to request a continuance in order to permit adequate investigation.

The Supreme Court, in *Strickland v. Washington,* 466 U.S. 668, 687 (1984), established a two-prong standard for ineffective-assistance-of-counsel claims. First, Cole must demonstrate that his counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. To show that the performance was deficient, Cole must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, Cole must show that his counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Deficient performance will be found to be prejudicial only upon a showing that, but for counsel's errors, there is a reasonable probability that the final result would have been different and that confidence in the reliability of the verdict is undermined. *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993); *Armstead v. Scott,* 37 F.3d 202, 206-07 (5th Cir. 1994).

"Even a deficient performance does not result in prejudice unless that conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon has [sic] having produced a just result." *Knox v. Johnson,* 224 F.3d 470, 479 (5th Cir. 2000).

A defendant must show "actual prejudice" as a result of his counsel's deficient performance. *Moody v. Johnson,* 139 F.3d 477, 482 (5th Cir. 1998). Cole is required to show "that the attorney's errors were so deficient as to render the verdict fundamentally unfair or unreliable." *Carter v. Johnson,* 131 F.3d 452, 463 (5th Cir. 1997). This "performance inquiry" is to be made applying a reasonableness standard; i.e., was counsel's assistance reasonable under all the circumstances, making the assessment not in hindsight, but evaluating the conduct from counsel's perspective at the time of the conduct. Thus, the reviewing court is to be highly deferential in scrutinizing counsel's performance. *Strickland,* 466 U.S. at 688-89.

"The failure to prove either deficient performance or actual prejudice forecloses an ineffective assistance claim." *Green v. Johnson,* 160 F.3d 1029 (5th Cir. 1998), *cert. denied,* 525 U.S. 1174 (1999). *See Goodwin v. Johnson,* 132 F.3d 162, 174 (5th Cir. 1997) (stating that the presence or absence of prejudice at either trial or appellate level hinges upon the fairness of the trial and the reliability of the verdict). It is not necessary, however, for a district court to address both requirements of the conjunctive *Strickland* standard when addressing an ineffective-assistance claim; such a claim may be disposed of solely on a petitioner's failure to meet either requirement. *Amos v. Scott,* 61 F.3d 333, 348 (5th Cir. 1995).

A petitioner must of affirmatively prove and not merely allege prejudice. *Mangum v. Hargett,* 67 F.3d 80, 84 (5th Cir. 1995); *Deville v. Whitley,* 21 F.3d 654, 659 (5th Cir. 1994). *See Armstead v. Scott,* 37 F.3d 202, 207 (5th Cir. 1994) (stating that the Fifth Circuit requires an appreciable showing of prejudice).

Conclusory allegations unsupported by any specific facts do not merit a federal court's attention. *Miller v. Johnson,* 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle,* 694 F.2d 1008, 1013 (5th Cir. 1983)) ("Conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding.").

The trial court appointed attorney Bob Spence to represent Cole on January 15, 1988. A trial date was set for May 17, 1988. On March 4, 1988, attorney Spence file [sic] a motion requesting appointment of co-counsel, acknowledging that he "had little experience in capital litigation." Attorney Spence requested the appointment of either Robert McGlasson or Scott Howe – attorneys associated with the Capital Punishment Clinic at the University of Texas School of Law in Austin.

On March 8, 1988, the trial court, rather than appoint co-counsel, authorized attorney Spence to hire co-counsel. On May 5, 1988, at a pretrial hearing, attorney Spence advised the court that no other counsel would be assisting him.

Cole's defense attorney was not ineffective because he did not hire co-counsel.

"An attorney can render effective assistance of counsel even if he has had no prior experience in criminal advocacy." *United States v. Lewis*, 786 F.2d 1278, 1281-82 (5th Cir. 1986) (citing *United States v. Kelley*, 559 F.2d 399, 401 (5th Cir. 1977)); *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). "Whether the defendant has been afforded his right to counsel depends on whether the attorney is reasonably likely to render and does render reasonably effective assistance, not on whether counsel has an extensive background in criminal defense work." *Lewis, supra*

(citing *Herring v. Estelle*, 491 F.2d 125, 126 (5th Cir. 1974)).

Counsel's decision to not pursue appointment of co-counsel should not be reviewed with the benefit of hindsight. *Strickland v. Washington*, 466 U.S. at 689 ("[a] fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Cole has failed to prove that attorney Spence's failure to hire co-counsel demonstrates deficient performance and that he was prejudiced by counsel's omission as is required by *Strickland*.

Cole's claim that his counsel was ineffective because he failed to conduct an adequate investigation to present and develop mitigating evidence and that counsel failed to effectively pursue and present the mitigating evidence at trial is without merit.

A habeas petitioner has a constitutionally protected right to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer. *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000). However, a habeas petitioner must meet both prongs of the *Strickland* standards for judging ineffective-assistance-of-counsel claims.

Cole alleges that attorney Spence failed to demand access to adequate investigative resources; however, he fails to explain or substantiate this claim. Mere speculation of ineffective assistance is not a basis for habeas

relief. *Kinnamon v. Scott,* 40 F.3d 731, 734-35 (5th Cir. 1994).

Cole fails to provide any specific examples or record evidence to substantiate his claim that counsel failed to prepare his punishment phase defense witnesses. Bald assertions without evidentiary support are insufficient to warrant collateral relief. *Ross v. Estelle,* 694 F.2d at 1011. Cole's belief that his counsel spent insufficient time working on his case is without merit. He fails to prove that attorney Spence's representation fell below an objective standard of reasonableness, e.g. that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" as required by *Strickland v. Washington*, 466 U.S. at 687.

Counsel's failure to develop or present mitigating background evidence is not *per se* deficient performance. *See, e.g., Crane v. Johnson*, 178 F.3d 309, 314 (5th Cir. 1999); *Williams v. Cain,* 125 F.3d 269, 277 (5th Cir. 1997).

In order to establish that counsel was rendered ineffective by virtue of a failure to investigate, a convicted defendant must do more that [sic] merely allege a failure to investigate – he must state with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *United States v. Green,* 882 F.2d 999, 1003 (5th Cir. 1989 (citing *Gray v. Lucas,* 677 F.2d at 1093)); *United States v. Lewis,* 786 F.2d 1278, 1283 (5th Cir. 1986); *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985). Here, Cole's general allegations regarding unnamed witnesses fail to warrant habeas relief.

Moreover, even if any investigation would have turned up admissible evidence, that fact is in itself insufficient to

show prejudice. *Gray v. Lucas,* 677 F.2d at 1092. As a result, Cole's broad-based claims of failure to investigate do not entitle him to habeas relief.

An informed decision by counsel not to present family members and friends simply because counsel does not believe they would make a good impression on the jury can be a plausible trial strategy. *See Livingston v. Johnson,* 107 F.3d 297, 308 (5th Cir. 1997).

As in *Kitchens v. Johnson,* 190 F.3d 698 (5th Cir. 1999), Cole's "argument essentially comes down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Id.* at 703.

In determining whether a habeas petitioner was prejudiced for any alleged failure to present mitigating evidence, the Court is

> required to compare the evidence presented at sentencing with all the mitigating evidence contained in the postconviction record. Stated to the point: Is this additional mitigating evidence so compelling that there is a reasonable probability at least one juror could reasonably have determined that, because of [Petitioner's] moral culpability, death was not an appropriate sentence.

Neal v. Johnson, ___ F.3d ___ (5th Cir. Jan. 17, 2000, No. 99-60511).

An examination of the punishment phase testimony from Cole's character witnesses reveals that all of the testimony which Cole now alleges could have been presented

through mitigating witnesses was in fact presented to the jury.

This Court has compared the defense evidence presented during the punishment phase with the evidence Cole alleges could or should have been presented. Cole fails to prove that there is a reasonable probability that one juror could have concluded that death was not an appropriate sentence.

Cole makes general and conclusory allegations of an alleged failure to investigate various aspects of his background, criminal history, and the veracity of his co-defendants. Cole fails to offer any proof to substantiate his claims.

Cole must satisfy both prongs of the *Strickland* standard in order to prevail on his claims of ineffective assistance of counsel. He has failed to meet the *Strickland* standard.

CONCLUSION

Based upon the above findings and conclusions, the Court is of the opinion that the Petition for Writ of Habeas Corpus should be denied. All relief not expressly granted is denied.

SO ORDERED.

Dated March 6, 2001.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

418 F.3d 494

United States Court of Appeals,
Fifth Circuit.

Ted Calvin COLE, now known as Jalil Abdul-Kabir,
Petitioner-Appellant,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.

No. 01-10646.

July 22, 2005.

Robert Charles Owen (argued), Raoul Dieter Schonemann, Owen & Rountree, Austin, TX, for Cole.

Carla Elaina Eldred (argued), Austin, TX, for Dretke.

Appeal from the United States District Court for the Northern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

WIENER, Circuit Judge:

This case returns to us on remand from the Supreme Court in light of its recent opinion in *Tennard v. Dretke*.[1] Petitioner-Appellant Ted Calvin Cole argues that a trio of recent cases – *Tennard*, *Smith v. Texas*,[2] and *Bigby v.*

---

[1] 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2003).

[2] 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2003).

Dretke[3] – require reversal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition and petition for a certificate of appealability ("COA"). Cole asserts that the Texas capital sentencing scheme's special issues did not allow the jury to give "full consideration and full effect" to the mitigating evidence that he presented at the punishment phase of his trial. We reverse the district court's denial of a COA, grant Cole a COA on his *Penry* claim, but ultimately affirm the district court's denial of habeas relief.

I. FACTS AND PROCEEDINGS

In December 1987, Cole was staying at an abandoned motel with his stepbrother, Michael Hickey ("Michael"), and Michael's wife, Kelly Hickey ("Kelly"). Cole mentioned to the Hickeys that he was willing to kill someone to obtain cash. Cole and Michael decided to rob Kelly's grandfather, Raymond Richardson, and then strangle him to death.

Two days after this conversation, Cole, Michael, and Kelly went to Richardson's home and visited with him in his living room for several hours. The group moved to the kitchen. As Richardson left the kitchen, Cole pushed him to the floor, where Richardson landed face down. Cole then sat on Richardson's back and strangled him with a dog leash that the men had brought to the house for this purpose. After Richardson died, the group put his body under his bed. They searched the house for cash, finding twenty dollars in Richardson's wallet. Michael took the cash from the wallet, and Cole took the money to the

[3] 402 F.3d 551 (5th Cir.2005).

grocery store to buy beer and bacon. Cole returned to Richardson's house and shared the groceries with Michael. The morning after the murder, Kelly and Michael surrendered themselves to the police and gave statements. Kelly eventually testified at Cole's trial.

The police arrested Cole at Richardson's home the morning after the murder. Cole gave the police two statements in which he confessed to having murdered Richardson. The statements were introduced against Cole at trial. In one of these statements, Cole admitted that the group decided to strangle Richardson because "it was quiter [sic] then [sic] shooting him and not as messy as cutting his throat and it just seemed the easiest way to do it." The jury found Cole guilty of the capital murder of Richardson while in the course of committing and attempting to commit robbery.

In response to special issues at the end of the penalty phase, the jury answered that (1) Cole had deliberately killed Richardson, and (2) there was a probability that Cole posed a threat of future dangerousness. The trial court accordingly sentenced Cole to death. The Texas Court of Criminal Appeals ("TCCA") affirmed Cole's conviction and sentence, and the United States Supreme Court denied his petition for a writ of certiorari.

Cole filed an application for post-conviction relief in state court, raising, *inter alia,* a *Penry v. Lynaugh*[4] claim. The trial court recommended denying Cole's application, and the TCCA did so.

---

[4] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("*Penry I*"), *abrogated on other grounds, Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Cole then filed a 28 U.S.C. § 2254 habeas corpus petition in the district court, raising six claims, including the *Penry* claim and an ineffective assistance of counsel claim. As to his *Penry* claim, Cole argued in the district court that his mitigating evidence of a "destructive family background" and of "organic neurological defects" – specifically, a lack of impulse control – was "constitutionally relevant mitigating evidence" under our precedent. Cole also argued that Texas's two special issues were not an effective vehicle for the jury to give "full consideration and full effect" to his mitigating evidence.

The district court held that Cole's evidence fell short of our standard for "constitutionally relevant" mitigating evidence. The district court also concluded that, regardless of any possible constitutional relevancy, the mitigating evidence that Cole presented during the penalty phase was fully within the jury's reach given the broad scope of the special issues.[5] The district court ultimately denied all of Cole's claims on the merits. The district court further denied Cole's motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) and Cole's motion for a certificate of appealability ("COA").

---

[5] The district court stated:

> Evidence of Cole's destructive family background evidence [sic] could be considered under the future dangerousness special issue.
>
> Evidence of Cole's organic neurological deficiency could be considered under either the deliberateness or the future dangerousness special issues. Testimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his "outgrowing" the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent.

Cole appealed the district court's denial of his Section 2254 habeas corpus petition, his motion to alter or amend the judgment, and his application for a COA. We denied Cole's motion for a COA as to his *Penry* claim. We held that reasonable jurists would not debate the district court's conclusion that Cole's evidence was not constitutionally relevant mitigating evidence. Cole asked us to reconsider our denial of a COA on this claim in light of the Supreme Court's grant of certiorari in *Smith v. Dretke*[6] and *Tennard v. Dretke*.[7] We rejected Cole's argument, denied his motion for reconsideration, and ultimately affirmed the district court's denial of Cole's Section 2254 habeas corpus petition.

Cole appealed to the Supreme Court. In light of its opinion in *Tennard,* in which the Supreme Court rejected our "constitutional relevancy" test for mitigating evidence, the Court vacated our panel opinion[8] and remanded for further proceedings consistent with *Tennard.*

DISCUSSION

Section 2253 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") forecloses appeal from a state habeas proceeding unless a circuit justice or judge issues a COA.[9] We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional

---

[6] 539 U.S. 986, 124 S.Ct. 46, 156 L.Ed.2d 703 (2003).

[7] 540 U.S. 945, 124 S.Ct. 383, 157 L.Ed.2d 275 (2003).

[8] *Abdul-Kabir v. Dretke,* ___ U.S. ___, 125 S.Ct. 496, 160 L.Ed.2d 368 (2004). Cole changed his name to Jalil Abdul-Kabir when he adopted the Muslim faith.

[9] 28 U.S.C. § 2253(c)(1)(A).

right."[10] To make this showing, Cole must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."[11]

In determining whether to grant a COA, we are limited "to a threshold inquiry into the underlying merit[s] of [Cole's] claims."[12] This threshold inquiry "does not require full consideration of the factual and legal bases adduced in support of the claims."[13] Instead, we base our determination on "an overview of the claims in the habeas petition and a general assessment of their merits."[14] When the district or state court has imposed the death penalty, "any doubts as to whether a COA should issue must be resolved in [petitioner's] favor."[15]

Cole argues that he is entitled to a COA on his claim that the Texas capital sentencing scheme's two special issues did not allow the jury to give "full consideration and full effect" to the mitigating evidence that he presented at the punishment phase of his trial. Specifically, Cole argues that *Tennard* and *Smith* – as well as our recent opinion in *Bigby* – require reversal of the district court's denial of his

---

[10] *Id.* § 2253(c)(2).

[11] *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

[12] *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029.

[13] *Id.* at 336, 123 S.Ct. 1029.

[14] *Id.*

[15] *Miller v. Dretke*, 404 F.3d 908, 913 (5th Cir.2005) (citing *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.2000)).

Section 2254 habeas corpus petition and request for a COA.

Texas's capital punishment scheme must meet two requirements to comply with the Eighth Amendment. First, it must "channel the discretion of judges and juries to ensure that death sentences are not meted out wantonly or freakishly."[16] Second, it must "confer sufficient discretion on the sentencing body to consider the character and record of the individual offender."[17] Accordingly, any relevant mitigating evidence "cannot be placed beyond the effective reach of the jury."[18] To prevail on a *Penry* claim, Cole must demonstrate that (1) the mitigating evidence adduced at the penalty phase of his trial meets the "low threshold for relevance;"[19] and, if so, (2) the evidence was beyond the effective reach of the jury.[20]

Before *Tennard,* to demonstrate that evidence was constitutionally relevant and mitigating, we required a petitioner to show that (1) he had a "uniquely severe permanent handicap" acquired through no fault of his own, and (2) there was a nexus between the offense and the petitioner's "severe permanent condition."[21] In our original panel opinion, we held that Cole had failed to

---

[16] *Graham v. Collins,* 506 U.S. 461, 468, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993).

[17] *Bigby,* 402 F.3d at 564 (citing *Graham,* 506 U.S. at 468, 113 S.Ct. 892).

[18] *Id.* (citing *Graham,* 506 U.S. at 475, 113 S.Ct. 892).

[19] *Tennard,* 124 S.Ct. at 2570.

[20] *See Bigby,* 402 F.3d at 564-65; *Madden v. Collins,* 18 F.3d 304, 308 (5th Cir.1994).

[21] *Davis v. Scott,* 51 F.3d 457, 460-61 (5th Cir.1995), *overruled in part by Tennard,* 124 S.Ct. at 2569-70.

demonstrate "that jurists of reason could debate the correctness of the district court's determination that the nexus requirement applie[d] to his *Penry* claim."

In *Tennard*, the Supreme Court explicitly rejected our "constitutional relevance" test.[22] The *Tennard* court stated:

> The Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for "constitutional relevance" before considering whether the jury instructions comported with the Eighth Amendment. Indeed, the mitigating evidence presented in *Penry I* was *concededly* relevant so even if limiting principles regarding relevance were suggested in our opinion – and we do not think they were – they could not have been material to the holding.[23]

The *Tennard* Court also clarified the standard for relevant mitigating evidence:

> We established that the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard – any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence – applies.[24]

---

[22] 124 S.Ct. at 2570.

[23] *Id.* (emphasis in original) (citations omitted).

[24] *Id.* (citing *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)) (quotations omitted).

Because we relied on the "nexus" requirement to deny Cole a COA on his *Penry I* claim, and because the district court relied – at least in part – on our now-defunct test, we hold that jurists of reason could debate whether Cole's mitigating evidence is relevant. Accordingly, we grant Cole a COA on this claim.

1. Relevant Mitigating Evidence

We must first determine whether Cole's mitigating evidence meets the low threshold for relevance as articulated by the *Tennard* Court.[25] The district court correctly classified Cole's mother's testimony of a destructive family background as follows:

> A. Cole's mother was an alcoholic who was unable to care for her children.
>
> B. Cole's father was arrested for trying to rob a liquor store.
>
> C. Cole's father deserted the family when Cole was five years old.[26]
>
> D. Cole's mother then moved with her children to her parents' home.
>
> E. Cole's grandparents were alcoholics who did not want the children to live with them.

---

[25] 124 S.Ct. at 2570.

[26] Cole's mother testified as to the last time Cole saw his father:

> The last time he saw his father, his father brought him to San Angelo. He had took [sic] him off to Abilene and brought him in [sic] San Angelo and dropped him off a block from where he thought I lived and said, "Your mother lives down in that block. Go find her," and drove off. That's the last time he had seen [sic] his father.

F. Cole was isolated from other children because his grandparents' home was eight miles out of town.

G. School buses did not run to the grandparents' home, and the grandparents did not allow Cole's mother to use their car to take Cole to school.

H. Cole was placed in a children's home at the age of five.

I. During Cole's five years in the home, his mother visited him only twice.

J. Cole's father never visited him at the home.

K. Cole's uncle adopted Cole's brother, but not Cole.

Dr. Jarvis Wright, a psychologist who administered a battery of psychological and neuropsychological tests to Cole, testified at Cole's punishment phase that Cole had a "very rugged, rough childhood," that he experienced "a bad, very painful background," and that he "never felt loved and worthwhile in his life." Dr. Wright stated that Cole had repressed many of the memories of his turbulent childhood. Dr. Wright also testified that Cole's family background led him to experience "terrific needs for nurturance," a "fragmented personality," and "chronic depression." He stated that while awaiting trial, Cole was so "distressed" and "distraught" that he tried to commit suicide by cutting his own throat.

The district court rejected Cole's "family background" evidence as relevant mitigating evidence because "[n]o testimony was presented that these events caused any type of psychological effect on Cole" and "Cole fail[ed] to

show that his commission of capital murder was in any way attributable to his 'destructive family background.'"

Given the low threshold for relevant mitigating evidence articulated by the *Tennard* Court, we find that evidence of Cole's turbulent family background constitutes relevant mitigating evidence. Cole need not show that any psychological condition caused by his destructive family background is linked to his conduct; he need only show that it existed, and that a jury could find that a sentence other than death would be warranted.[27] The district court erred when it rejected Cole's evidence of a destructive family background under the "nexus" test expressly rejected by the Supreme Court in *Tennard*. The Supreme Court itself has sanctioned evidence of family history and emotional disturbance as relevant mitigating evidence.[28]

We also conclude that Cole's evidence of "organic neurological deficiency"– specifically, a lack of impulse control – is relevant mitigating evidence. Dr. Wright explicitly testified that Cole suffered from diminished impulse control. He stated:

---

[27] *See Tennard*, 124 S.Ct. at 2570; *see also Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (holding that evidence of a defendant's good conduct in jail, while not related specifically to his culpability for the crime that he committed, must be allowed before the jury because "such evidence would be mitigating in the sense that it might serve as a basis for a sentence less than death").

[28] *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) ("Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence . . . Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.").

> Ted[29] lacks a great deal of impulse control. And I think that's important in these tests I gave. . . . It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of Ted's background, all these other things, we're going to have an individual with some real problems with impulse control.[30]

Dr. Wright also stated that the combination of Cole's destructive childhood of neglect and abandonment had impaired his judgment and his ability to control his behavior. According to Dr. Wright, Cole learned to cope with reality by living in a "fantasy" world. Dr. Wright testified that although Cole started out in life with "fantastic raw material," the abandonment, neglect, and mistreatment that he suffered as a child left his personality "very damaged" and "horribly" distorted.

The district court rejected Cole's evidence of organic neurological deficiency because the "[t]estimony from Dr. Jarvis Wright fail[ed] to establish that Cole actually suffers from any organic brain damage, let alone that the disorder constitutes a 'uniquely severe handicap' to which Cole's criminal act was attributable."[31] Because it relied on

---

[29] "Ted" refers to Cole in the direct citations from the record.

[30] Although Cole scored in the bottom five per cent of the population on some of the tests, he scored a 132 on an I.Q. test.

[31] The district court also rejected Cole's evidence of organic neurological deficiency as relevant mitigating evidence because the "evidence [was] entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit." As noted above, however, because the district court applied an improper test to screen the mitigating evidence, it erred. Further, it is within the sentencer's province to accord the appropriate weight to any mitigating evidence. *See, e.g., Shannon v. State,* 942 S.W.2d 591, 597 (Tex.Crim.App.1996)

(Continued on following page)

a test that the Supreme Court has "never countenanced" and has now "unequivocally rejected," the district court "'assessed [Cole's] claim under an improper legal standard.'"[32] That Cole's evidence was relevant for purposes of mitigation is now clear under current Supreme Court precedent.[33]

2. Jury Instructions

With that background to establish the framework of our analysis, we turn to the principal issue in dispute – whether, at the punishment phase of his trial, Texas's special issues allowed Cole's jury to give full consideration and effect to the evidence of destructive family background and organic neurological deficiency. Cole argues that a COA should issue because reasonable jurists could disagree with the district court's conclusion that his relevant mitigating evidence was not beyond the effective reach of the jury. In light of the Supreme Court's opinion in *Smith* and our recent opinion in *Bigby,* we conclude that jurists of

---

("Instead, jurors must individually determine what evidence, if any, mitigates against the imposition of the death penalty, and what weight, if any, to give that evidence in its consideration."). Because any possible organic deficiency could weigh against a death sentence, it is relevant mitigating evidence under *Tennard.*

[32] *Smith,* 125 S.Ct. at 405.

[33] *See Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor, any aspect of a defendant's character* or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original and added)); *see also Tennard,* 124 S.Ct. at 2573 ("Impaired intellectual functioning is inherently mitigating.") (citing *Atkins v. Virginia,* 536 U.S. 304, 316, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)).

reason could debate the district court's conclusion that Cole's mitigating evidence was not beyond the effective reach of the jury. Accordingly, we reach the merits of Cole's claim.

At the end of the punishment phase of the trial, the state trial court instructed the jury to consider two special issues pursuant to Texas Code of Criminal Procedure article 37.071(2)(b):

> (1) Was the conduct of the defendant, TED CALVIN COLE, that caused the death of the deceased, RAYMOND C. RICHARDSON, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Is there a probability that the defendant, TED CALVIN COLE, would commit criminal acts of violence that would constitute a continuing threat to society?

The jury charge also contained the following supplemental instruction:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to the Special Issues hereby submitted to you.

Cole contends that, in violation of *Penry I*, the two special issues "shackled and confined" the jury's consideration of

his mitigating evidence and provided no vehicle for the jury to give it full mitigating effect.

At the punishment phase of the trial in *Penry I,* the defense presented mitigating evidence of Penry's mental retardation and severe physical abuse. At the conclusion of the penalty phase, the trial court instructed the jury to consider the two special issues that we address here.[34] The jury answered "yes" to the special issues, and the trial court sentenced Penry to death.

In the Supreme Court, Penry argued that Texas's special issues did not allow the jury to give consideration and effect to his mitigating evidence. The Court agreed, holding that "in certain cases Texas'[s] statutory special issues, as applied, d[o] not give the jury sufficient opportunity to consider and give effect to the mitigation evidence without appropriate additional instructions."[35] Thus, when the mitigating evidence offered by the defendant (1) is not relevant to the special issues, or (2) is beyond the scope of the special issues, and "the jury [is] otherwise unable to express its reasoned moral response to that evidence in rendering its sentencing decision," the sentencing court must provide the jury with additional instructions to inform it that it may consider and give effect to a defendant's mitigating evidence.[36]

---

[34] The *Penry I* trial court also instructed the jury to consider a third special issue – whether the defendant's conduct was an unreasonable response to any provocation by the victim – which is not at issue here.

[35] *Bigby,* 402 F.3d at 568 (citing *Penry I,* 492 U.S. at 318, 109 S.Ct. 2934).

[36] *Id.*

At Penry's retrial, on remand from the Supreme Court, the state court instructed the jury to answer the special issues but included a supplemental instruction that the jury was to consider any mitigating evidence offered by Penry during the punishment phase:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issues.* If you determine, when giving effect to the mitigation evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,* rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues.*[37]

The jury again found Penry guilty, he was again sentenced to death, and he again appealed.

The Supreme Court held that the trial court's supplemental instruction was "an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence."[38] The Court first clarified that

> *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it

---

[37] *Penry v. Johnson* ("*Penry II*"), 532 U.S. 782, 797-98, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (emphasis in original) (quoting trial court).

[38] *Id.* at 790, 121 S.Ct. 1910.

> may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key to *Penry I* is that the jury be able to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence."[39]

Concentrating on the italicized language in the state court's supplemental instruction, the Court found the instruction constitutionally inadequate because "the jury's ability to consider and give effect to Penry's mitigating evidence was still 'shackled and confined within the scope of the three special issues,'"[40] which were not broad enough to encompass Penry's evidence of mental retardation and childhood abuse.

The Court also explained that even if the supplemental instruction and verdict form had allowed the jury to respond in the negative to one of the special issues and thereby avoid sentencing Penry to death, it "would have been both logically and ethically impossible for a juror to follow both sets of instructions," i.e., the special issues instructions and the supplemental instruction.[41] The Court reasoned:

> Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the

---

[39] *Id.* at 797, 121 S.Ct. 1910 (citations omitted) (alteration and emphasis in original).

[40] *Id.* at 798, 121 S.Ct. 1910 (quoting *Penry v. Johnson*, 215 F.3d 504, 514 (5th Cir.2000) (Dennis, J., dissenting)).

[41] *Id.* at 799, 121 S.Ct. 1910.

> supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "'true verdict.'"[42]

The supplemental instruction thus inserted "an element of capriciousness" into the jury's sentencing decision, because a juror would have had to be willing to elevate the supplemental instruction over the verdict form instruction.[43] The Court also concluded that "a clearly drafted catchall instruction on mitigating evidence ... might have complied with *Penry I*," specifically noting that Texas's current capital sentencing scheme now includes such a catchall provision.[44]

In *Smith v. Texas,* the Supreme Court confronted jury instructions similar to those in *Penry II* and again held the

---

[42] *Id.* at 799-800, 121 S.Ct. 1910.

[43] *Id.* at 800, 121 S.Ct. 1910.

[44] *Id.* The current Texas statutory scheme provides:

> The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article [the special issues subsection], it shall answer the following issue:
>
> > Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex.Code Crim P. art. 37.071(2)(e)(1).

instructions unconstitutional.[45] The Court first held that the special issues were not broad enough to encompass Smith's evidence of organic learning disabilities and speech handicaps, a low IQ, and a drug-addicted criminal father.[46] Although the *Smith* instructions were not identical to those in *Penry II,* the Court found any difference constitutionally insignificant because, as we noted in *Bigby,* the *Smith* jury still "faced . . . the ethical dilemma of either answering the special issue questions in a manner prescribed on the verdict form and ignoring the supplemental instruction, or answering the questions as prescribed by

---

[45] 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004). The supplemental instruction in *Smith* read as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating . . . . You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves. In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendants should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

Id. at 402-03.

[46] *Id.* at 407.

the supplemental instruction which necessarily meant ignoring the verdict form."[47] The Court concluded that the supplemental instruction unconstitutionally shackled the jury's consideration of Smith's mitigating evidence to the special issues.[48]

With this in mind, we address Cole's claim that *Penry I, Penry II, Tennard*, and *Smith* require reversal of the district court's denial of his habeas application. Cole contends that the special issues are not broad enough to encompass his mitigating evidence of a destructive family background and an organic neurological deficiency, including diminished impulse control. Specifically, Cole argues that the two special issues do not provide an adequate vehicle for the jury to consider his mitigating evidence. As the Supreme Court has expressly limited *Penry I*'s application to cases in which "the constitutional defect lay in the fact that relevant mitigating evidence [is] placed beyond the effective reach of the sentencer,"[49] we must first determine whether the special issues are broad enough to encompass Cole's mitigating evidence. We conclude that they are.

Cole's reliance on *Penry I, Penry II, Tennard*, and *Smith* is misplaced. *Penry I* and *II* are readily distinguishable from this case. In *Johnson v. Texas*,[50] the Supreme Court confirmed the limited scope of *Penry I* and *II*. Although the defendant in *Johnson* insisted that the Texas special

---

[47] *Bigby*, 402 F.3d at 570.

[48] *See id.* at 572.

[49] *Graham*, 506 U.S. at 475, 113 S.Ct. 892; *see Bigby*, 402 F.3d at 570.

[50] 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

issues prevented the jury from considering the mitigating effect of his youth,[51] the Court rejected that argument and, in doing so, clarified *Penry*'s scope.

In *Johnson,* the Court explained that in *Penry,* "there was expert medical testimony that the defendant was mentally retarded and that his condition prevented him from learning from his mistakes."[52] As the expert testimony intimated that Penry was unable to learn from his mistakes, the *Johnson* Court concluded that the only logical manner in which Penry's jury could have considered the evidence of his mental retardation under the future dangerousness special issue was as an *aggravating* factor: Penry would remain a danger in the future because there was no chance that he would ever understand that rape and murder were wrong.[53] Thus, Penry's jury was unable to give any mitigating effect to the mental retardation evidence that he proffered.

Here, however, the mitigating evidence of Cole's destructive family background and organic neurological deficiency falls outside of *Penry*'s holding. With regard to Cole's mitigating evidence of "organic deficiency," the testimony proffered by two of Cole's own expert witnesses is directly contrary to the testimony at Penry's penalty phase that the *Penry* Court found aggravating. In response to direct questions on Cole's future dangerousness, Dr. Wright provided the following testimony:

---

[51] *See id.* at 368, 113 S.Ct. 2658.

[52] *Id.* at 369, 113 S.Ct. 2658 (citing *Penry I,* 492 U.S. at 308-09, 109 S.Ct. 2934).

[53] *See id.* (citing *Penry I,* 492 U.S. at 323, 109 S.Ct. 2934).

I think the research certainly indicates that individuals like Ted, individuals who have had this kind of background, tend to begin making changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a bit and change a good bit. You can infer that from some of the FBI statistics on age and changes in persons.

But I think as we see him age, get older, hormones change, the process of aging takes over, as it does in all of us – and we all change. I think the evidence is overwhelming there that individuals who have behaved as he has change. They burn out. And I think there's a good chance of later in life – not now, but later in life – some changes.

I'm suggesting that, as we grow older, we change; the compass points a different direction. We're tired. We're – we're – our goals, our orientation is different. The research indicates that – that this is the case with individuals who commit violent or antisocial acts.

We also know from probabilities that, as people grow older, the probability of them becoming involved in violent acts decreases to the point of fifty, where the FBI statistics would indicate that they're almost – it almost doesn't happen. These behaviors have almost burned out of individuals. While they may be flaming while they're younger, they burn out later. So I don't have any specific statements for Ted as an individual. That would take a crystal ball. But for Ted as a – as a human being, we know this happens to human beings who are like Ted, who have histories like Ted. We know from statistics that they change, as we do all change.

Dr. Wright also testified that even though Cole's diary demonstrated a "fantasy" to behave like a "modern-day Viking" or a "pirate," Cole was unlikely to act on such fantasies because he did not have the "wherewithal" to do so.

The former chief mental health officer for the Texas Department of Corrections, Wendel L. Dickerson, Ph.D., also testified on Cole's behalf. Dr. Dickerson first explained the process behind "predicting future behavior and future violent conduct in particular." He then testified:

> . . . on the basis of the statistical data available to use, that diagnosis would necessarily apply five, ten, fifteen years from now. I mean, whatever condition he is suffering from is not necessarily immutable and unchangeable. I mean it can be changed – I mean, time changes – I mean – and experience changes people. Changes in body changes people.
>
> Old person gets older. Their hormones change. The brain changes. So it's – I mean, just because he's dangerous – if he's considered dangerous today, does not necessarily mean he's going to be dangerous at some future point in time.

In addition, although the State's expert witness testified that Cole would remain a danger as long as he lived, Dr. Dickerson attempted to rebut this testimony:

> Whenever we assert that someone is dangerous, we're saying that he's more likely to actually act out. However, when we reach that diagnosis – it's been demonstrated in study after study that that diagnosis actually leads to – is followed by violent conduct only about one in three times. So you're wrong – whenever you say somebody is

> dangerous, say he's going to do something violent or aggressive, you're going to be wrong about twice as often as you're – as you're right.

Unlike the evidence in *Penry,* Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes. The record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, i.e., because he cannot learn from his mistakes, he will remain a danger in the future. Rather, the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future.[54] The evidence intimated that someone from Cole's abusive background begins to change later in life. This evidence also suggests that even someone with a lower than normal IQ or an organic neurological deficiency changes later in life. That this evidence fits well within the broad scope of the future

---

[54] This testimony also distinguishes Cole's case from Bigby's. In *Bigby,* the panel relied heavily on testimony that Bigby's schizophrenia "cannot be adequately controlled or treated." 402 F.3d at 571. As with Penry's evidence that he was unable to learn from his mistakes, Bigby's mitigation evidence contained the same "double-edged sword" as Penry's. *See id.* Because Bigby's schizophrenia could not be controlled or treated, the jury could have considered it an aggravating factor under the future dangerousness issue. *See id.*

At oral argument, counsel for the state conceded that the mitigating evidence that Cole presented at trial could perhaps be a double-edged sword. We do not, however, read *Penry I* and *Bigby* to stand for the broad proposition that any evidence that the jury may deem either mitigating or aggravating can not be given effect under *Penry I.* As we noted above, a jury can not [sic] give mitigating effect to evidence that can be seen as aggravating *only. See Penry I,* 492 U.S. at 323 ("Although this [mental retardation] evidence is relevant to the second issue, it is relevant *only* as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." (emphasis in original and added)). Here, on the contrary, Cole's mitigating evidence does not suggest *only* a "yes" answer to the future dangerousness issue.

dangerousness special issue is clearly evident from the testimony of Cole's own expert witnesses.

Further, the Supreme Court itself has indicated that "family background" evidence falls within the broad scope of Texas's special issues. In *Graham,* the Court stated:

> Moreover, we are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh.* As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. *We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light.* Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse.[55]

The Supreme Court has drawn a significant distinction between the type of evidence that Penry presented at his trial and the evidence that Cole presented at his, which falls within the scope of Texas's special issues.

As the district court correctly concluded in its alternative analysis, Cole's mitigating evidence falls within the scope of the special issues. Specifically, the jury could have considered Cole's family background and organic deficiency evidence under – at the least – the future dangerousness

---

[55] *Graham,* 506 U.S. at 476, 113 S.Ct. 892 (emphasis added).

special issue. Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future.

Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry,* or the result that we reach today. As we have explained, the principal concern of the Court in *Tennard* was our constitutional relevancy test, on which we relied to affirm the denial of Cole's habeas corpus petition. Whether the mitigating evidence that Tennard presented at the punishment phase of his trial fit within the scope of the special issues was of only secondary concern to the Court.[56] What mattered in *Tennard* was that under our constitutional relevancy test, most mitigating evidence would have been "screened out" before a court would ever have considered whether the evidence fell within the scope of the special issues.[57]

Further, explained the *Tennard* Court, our court should have answered the following question: "Has Tennard 'demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong?'"[58] In conducting this analysis, the Court held that "[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the

---

[56] Indeed, the Court devoted only the last paragraph of the opinion to the dispute present here. *See Tennard,* 124 S.Ct. at 2572-73.

[57] *See id.* at 2571.

[58] *Id.* at 2572 (citing *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

individual's ability to act deliberately."[59] It also stated that "[a] reasonable jurist could conclude that the jury might well have given Tennard's low IQ evidence aggravating effect in considering his future dangerousness, not only as a matter of probable inference from the evidence but also because the prosecutor told them to do so. . . ."[60]

The situation here is distinguishable from that in *Tennard*. We recognize that the trial court failed to define "deliberately" with respect to the first special issue,[61] but we cannot conclude that the jury could have given Cole's mitigating evidence an aggravating effect. The state prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating. Neither did he "press[] exactly the most problematic interpretation of the special issues, suggesting that [Cole]'s low IQ was irrelevant in mitigation, but relevant to the question whether he posed a future danger."[62] Accordingly, Cole's prosecutor here did not place the jurors in the ethical dilemma of responding falsely to a special issue. And, as we explained above, under the instructions it was given, the jury could have considered and given effect to Cole's mitigating evidence under the future dangerousness special issue.

---

[59] *Id.* at 2572 (citing *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934).

[60] *Id.* The prosecutor stated, "[W]hether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger is the criteria to use in answering that question." *Id.* (alteration in original).

[61] *See Penry II*, 532 U.S. at 803, 121 S.Ct. 1910.

[62] *Tennard*, 124 S.Ct. at 2572.

Neither does *Smith* require a different result. In *Smith,* the Court held that the state trial court's "nullification instruction" was constitutionally inadequate to provide the jury with an effective vehicle to consider Smith's mitigating evidence of low IQ, youth, and family background.[63] The Court concluded that the mandatory language in the charge "could possibly have intensified the dilemma faced by ethical jurors."[64] The Court noted that, just as in *Penry II,* the *Smith* jurors were faced with having to voice a false answer to a special issue – a special issue that they had sworn to uphold if the prosecution proved it beyond a reasonable doubt – to avoid the death penalty.[65]

Here, however, the supplemental instruction[66] is distinguishable from the one given at either Smith's or Penry's trial.[67] In *Boyde v. California,*[68] the Supreme Court

---

[63] 125 S.Ct. at 406-07.

[64] *Id.* at 407. In *Smith,* the Court noted that the trial court instructed the jury that if "you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you *shall* answer at least one of the Special Issues 'No'. . . ." *Id.* at 403 (emphasis added) (quoting trial court). For the full instruction, *see supra* note 45.

[65] *See id.*

[66] Cole contends that the supplemental instruction is a "nullification instruction," similar to those struck down as unconstitutional in both *Smith* and *Penry.* We do not find that this is so. The trial court's supplemental instruction did not "direct[] the jury to give effect to mitigation evidence, but allow[] the jury to do so only by negating what would be affirmative responses to two special issues relating to deliberateness and future dangerousness." *Id.* at 401. The supplemental instruction here merely instructed the jury to *consider* the mitigating evidence when deciding the special issues.

[67] For a full quotation of the instruction, *see supra* page 502-03.

[68] 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

delineated the standard under which we assess whether the jury instructions allowed the jury to consider and give effect to a defendant's mitigating evidence. There, the Court held that a reviewing court must determine "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[69] "Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than the mere possibility of such a bar."[70] To evaluate the instructions, we do not "engage in a technical parsing" of the language in the instructions, but instead "approach the instructions in that same way that the jury would – with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'"[71]

The Supreme Court has upheld the use of this instruction – almost word for word – in *Johnson v. Texas,* in which it held that Texas's special issues were broad enough to encompass mitigating evidence of youth.[72] The difference in the language of the instruction upheld in *Johnson* and that struck down in *Penry II* and *Smith* is instructive. Whereas the instructions in *Smith* and *Penry II* specifically tied an answer to the special issues to the mitigating evidence, the instruction in *Johnson* merely instructed the jury to consider all of the evidence when

---

[69] *Id.* at 380, 110 S.Ct. 1190 (emphasis added).

[70] *Id.*

[71] *Johnson v. Texas,* 509 U.S. 350, 368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (quoting *Boyde,* 494 U.S. at 381, 110 S.Ct. 1190).

[72] 509 U.S. at 355, 113 S.Ct. 2658.

answering the special issues. The import of the Supreme Court's focus on state trial court nullification instructions (which, as we note above, we do not have here) is to determine whether the jury was given conflicting duties, viz., to answer the special issues "yes" if the prosecution proves them beyond a reasonable doubt but to respond negatively to one of them (even if proven beyond a reasonable doubt) if the mitigating evidence demonstrates that the defendant does not merit a sentence of death, thereby violating their oath to respond truthfully to the special issues. The ethical dilemma in which the conflicting instructions place the jury constitute the constitutional violation.

We are not presented with that situation here. As in *Johnson,* Cole's state trial court instructed the jury to consider *all* of the evidence – from the guilt and punishment phases – when it responded to the special issues. The trial court used no mandatory language, instead instructing the jury that it "may" consider all of the evidence. Further, the instruction here did not specifically tie an answer to a special issue to the mitigating evidence.[73] Accordingly, the state trial court did not deliver conflicting instructions that would place the jurors in an ethical dilemma. The trial court did not instruct the jury to

---

[73] This further distinguishes Cole's case from Bigby's. *See Bigby,* 402 F.3d at 572 ("Like the supplemental instructions in both *Penry II* and *Smith,* this instruction ties the jury's consideration of Bigby's mitigating evidence to the special issues. Specifically, it instructs the jury that if they find the mitigating evidence sufficient to warrant a life sentence rather than the death penalty, they must answer any special issues '*to which such mitigating circumstances apply*' in the negative. Thus, the instruction effectively shackled and confined the jury within the scope of the special issues.").

answer "yes" to the special issues if the prosecution proved them beyond a reasonable doubt and then instruct them to respond "no" (falsely) to one of the special issues if the mitigating evidence demonstrated that Cole did not deserve death.

Cole advances that the special issues must allow the jury to be able to respond favorably to the specific facts of each defendant's case. Stated differently, Cole contends that "generic" mitigating evidence is not sufficiently particularized to allow the jury to give it mitigating effect. Specifically, Cole maintains that the evidence that he presented at the punishment phase of his trial supported *only* the proposition that "everyone" mellows as they tend to get older. Thus, he urges, such evidence is insufficient to allow the jury to consider the mitigating evidence with respect to Cole as an individual. Cole maintains that *Smith* supports this proposition.

We do not read *Smith* so broadly. Although we recognize that we must consider the particularized facts of each defendant's case, nothing in *Smith* supports Cole's argument that trial counsel must submit "specific" – as opposed to "generic" – mitigating evidence at the punishment phase of trial. We do not have an ineffective assistance of counsel claim before us. Whether Cole's counsel should have presented more specific mitigating evidence is not a claim that we must reach today.

Further, we note that the mitigating evidence here is not as generic as counsel maintains. Both Dr. Wright and Dr. Dickerson explicitly referenced Cole when they testified at the punishment phase of the trial. Despite counsel's argument that the evidence supported only the proposition that all of us tend to "mellow" as we get older, Dr. Wright

and Dr. Dickerson compared Cole to the "generic" and broad mitigating evidence that they presented. Indeed, as Dr. Wright noted, to be any more specific with regard to Cole's particular future behavior would require a "crystal ball." The specific references to Cole in Dr. Wright's and Dr. Dickerson's testimony lead us to conclude that the jury could easily have understood that they included Cole individually within the mitigating evidence that they presented.

CONCLUSION

Because we conclude that jurists of reason could disagree with the district court's resolution of Cole's claims that the Texas special issues were not broad enough to allow the jury to give "full consideration and full effect" to his mitigating evidence, we reverse the district court's denial of a COA on Cole's *Penry* claim and grant him a COA. For the foregoing reasons, however, we ultimately conclude that the Texas special issues allowed the jury to give "full consideration and full effect" to the mitigating evidence that Cole presented at the punishment phase of his trial. We therefore affirm the district court's judgment denying habeas relief.

2006 WL 1523202 (Mem)
___S.Ct. ___, 75 USLW 3203

Supreme Court of the United States
Jalil ABDUL-KABIR fka **Ted** Calvin **Cole**,
petitioner,
v.
Nathaniel QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.
No. 05-11284.

Oct. 13, 2006

Case below, *Cole v. Dretke*, 443 F.3d 441.

Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United Staes Court of Appeals for the Fifth Circuit granted. The case is consolidated and a total of one hour is allotted for oral argument.